

## TWO PARADIGMS OF JURISDICTION

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## I. INTRODUCTION

### A. *The Thesis of Converging Legal Orders*

Globalization causes convergence of legal orders. Or so it is argued. Law and economics scholars predict that legal orders will move towards the same efficient end state. They argue that the requirements of globalization will pressure legal orders to converge on the level of economic efficiency, because regulatory competition between legal orders makes it impossible for individual legal systems to maintain suboptimal solutions.<sup>1</sup> Many comparative lawyers predict a similar convergence. In particular traditional functionalist comparatists have long held that unification of law was both desirable and unavoidable.<sup>2</sup> Their basic argument is based on functional equivalence and can be summarized as follows: legal systems may look different because they have different doctrines and institutions; these differences, however, are only superficial, because the institutions fulfill the same functions and are therefore actually simi-

1. The debate over this issue is immense. For two overview articles, see Anthony Ogus, *Competition Between National Legal Systems: A Contribution of Economic Analysis to Comparative Law*, 48 INT'L & COMP. L.Q. 405 (1999); Ugo A. Mattei, Luisa Antonioli & Andrea Rossato, *Comparative Law and Economics*, in 1 ENCYCLOPEDIA OF LAW AND ECONOMICS 505, 508–14 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000). The convergence debate has been especially vigorous in corporate law; for an overview, see Jennifer G. Hill, *The Persistent Debate about Convergence in Comparative Corporate Governance*, 27 SYDNEY L. REV. 743 (2005). It is not always clear whether convergence is meant to concern form or substance; see Ronald J. Gilson, *Globalizing Corporate Governance: Convergence of Form or Function*, 49 AM. J. COMP. L. 329 (2001).

2. For the relationship between similarity and difference in comparative law, see Catherine Valcke, *Comparative Law as Comparative Jurisprudence—The Comparability of Legal Systems*, 52 AM. J. COMP. L. 713 (2004); Gerhard Dannemann, *Comparative Law: Study of Similarities or Differences?*, in OXFORD HANDBOOK OF COMPARATIVE LAW 383 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

lar. Realizing that legal orders are already similar in substance should make it easy to unify the law formally as well.<sup>3</sup>

Others see legal culture as an obstacle to (or a savior from) such convergence.<sup>4</sup> Culture is portrayed as a bulwark against the exclusive focus on efficiency that many economists advocate.<sup>5</sup> Similarly, comparative lawyers invoke cultural difference as a counterweight to the similarities that functionalist comparatists emphasize.<sup>6</sup>

This suggests that convergence should be difficult where domestic culture and values are important, such as in criminal law and family law, but easy in areas such as economic law, where domestic values are largely similar and transnational contacts put pressure on national legal systems. Even if culture underpins economic laws,<sup>7</sup> it is difficult to see why this culture should be national and why economic globalization should not rather create a global culture,<sup>8</sup> which in turn should facilitate legal convergence and unification.

### B. *The Challenge of Persistent Differences in International Jurisdiction*

This distinction between value-free transnational areas of law that converge, and value-laden local areas of law that do not, is not in accordance with reality. The biggest challenge for the convergence thesis comes not from theory but practice: it is not happening. To be sure, we see considerable convergence in many areas of the law—accounting standards, corporate governance, and capital markets, for instance.

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3. E.g., KONRAD ZWEIGERT & HEIN KÖTZ, *INTRODUCTION TO COMPARATIVE LAW* 24 (Tony Weir trans., 3d ed. 1998); Ugo Mattei, *A Transaction Costs Approach to the European Civil Code*, 5 EUR. REV. PRIV. L. 537 (1997); for discussion, see Ralf Michaels, *The Functional Method of Comparative Law*, in OXFORD HANDBOOK OF COMPARATIVE LAW, *supra* note 2, at 339, 376–78.

4. For the most outspoken version of this view, see Pierre Legrand, *European Legal Systems Are Not Converging*, 45 INT'L & COMP. L.Q. 52, 61–62 (1996).

5. See ASSOCIATION HENRI CAPITANT DES AMIS DE LA CULTURE JURIDIQUE FRANÇAISE, *LES DROITS DE TRADITION CIVILISTE EN QUESTION. À PROPOS DES RAPPORTS Doing Business DE LA BANQUE MONDIALE* 7 (2006), [http://www.henricapitant.org/IMG/pdf/Les\\_droits\\_de\\_tradition\\_civiliste\\_en\\_question.pdf](http://www.henricapitant.org/IMG/pdf/Les_droits_de_tradition_civiliste_en_question.pdf).

6. See generally Günter Frankenberg, *Critical Comparisons: Rethinking Comparative Law*, 26 HARV. INT'L L.J. 411 (1985); BERNHARD GROSSFELD, *CORE QUESTIONS OF COMPARATIVE LAW* (Vivian Grosswald Curran trans., 2005); PIERRE LEGRAND, *LE DROIT COMPARÉ* (1999); Vivian Grosswald Curran, *Dealing in Difference: Comparative Law's Potential for Broadening Legal Perspectives*, 46 AM. J. COMP. L. 657 (1998); see also Dannemann, *supra* note 2, at 389–91.

7. Pierre Legrand, *Counterpoint: Law Is Also Culture*, in *THE UNIFICATION OF INTERNATIONAL COMMERCIAL LAW* 245 (Franco Ferrari ed., 1998).

8. See Volkmar Gessner, *Global Approaches in the Sociology of Law: Problems and Challenges*, 22 J.L. SOC'Y 85, 90 (1995); Charles Koch, *Envisioning a Global Legal Culture*, 25 MICH. J. INT'L L. 1 (2003); Russell Menyhart, *Changing Identities and Changing Law: Possibilities for a Global Legal Culture*, 10 IND. J. GLOBAL LEGAL STUD. 157 (2003).

Nonetheless, we also see areas of economic law that are surprisingly resistant to convergence. This resistance to change represents a serious challenge to the convergence thesis and constitutes the focus of this Article.

One area where convergence is not taking place is the law of personal jurisdiction in international cases. Personal jurisdiction is an area in which the strong interdependence between legal systems suggests that unification should be desirable or that convergence should occur. Moreover, there is substantive agreement about the values involved: "Most legal systems recognize the requirement that the parties and the transaction have some connection with that legal system before an organ of that system—paradigmatically a court—can take action."<sup>9</sup> And yet, U.S. and European approaches remain remarkably different,<sup>10</sup> and mutual understanding remains difficult. Europeans are said to fear U.S. courts like medieval torture chambers;<sup>11</sup> they regularly regard assertions of jurisdiction by U.S. courts as acts of judicial hegemonialism.<sup>12</sup> Americans are barely less concerned over being dragged into European courts. For example, when France asserted jurisdiction over Yahoo! on the mere basis that its website was accessible from French computers,<sup>13</sup> many Americans were outraged.

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9. EUGENE F. SCOLES, PETER HAY, PATRICK J. BORCHERS & SYMEON C. SYMEONIDES, *CONFLICT OF LAWS* 288 (4th ed. 2004).

10. *E.g.* Arthur T. von Mehren, *Theory and Practice of Adjudicatory Authority in Private International Law: A Comparative Study of the Doctrine, Policies and Practices of Common- and Civil-Law Systems*, 295 *RECUEIL DES COURS* 9 (2002); SAMUEL P. BAUMGARTNER, *THE PROPOSED HAGUE CONVENTION ON JURISDICTION AND FOREIGN JUDGMENTS* 11–73 (2003); Ronald A. Brand, *Private Law and Public Regulation in U.S. Courts*, 2 *CILE STUDIES* 115 (2005); Alegría Borràs, *The 1999 Preliminary Draft Hague Convention on Jurisdiction, Recognition and Enforcement of Judgments: Agreements and Disagreements*, in *THE HAGUE PRELIMINARY DRAFT CONVENTION ON JURISDICTION AND JUDGMENTS* 41 (Fausto Pocar & Constanza Honorati eds., 2005).

11. Brand, *supra* note 10, at 116.

12. For a selection of authors from different countries, see JULIE ALLARD & ANTOINE GARAPON, *LES JUGES DANS LA MONDIALISATION* 36 (2005); MIREILLE DELMAS-MARTY, *LE RELATIF ET L'UNIVERSEL* 405 (2004); Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 *EUR. J. INT'L L.* 369, 400–404 (2005); Ugo Mattei & Jeffrey S. Lena, *United States Jurisdiction Over Conflicts Arising Outside of the US: Some Hegemonic Implications*, 1 *GLOBAL JURIST TOPICS*, No. 2, Art. 5 (2001), <http://www.bepress.com/gj/topics/vol1/iss2/art5>; Willibald Posch, *Ambulance Chasing im Dienste US-amerikanischer Rechtshegemonie—Wird "forum shopping" durch in Österreich tätige Anwälte gesellschaftsfähig? Kritische Anmerkungen zu einem aktuellen Vorgang*, 42 *ZEITSCHRIFT FÜR RECHTSVERGLEICHUNG* 14 (2001). For criticism of this view, see Ralf Michaels, *US-Gerichte als Weltgerichte. Die Avantgarde der Globalisierung*, 31 *DAJV-NEWSLETTER* 46, 54 (2006).

13. See Tribunal de grande instance [T.G.I.] [court of original jurisdiction] Paris, May 22, 2000 (Fr.), available at <http://www.juriscom.net/txt/jurisfr/cti/tgiparis20000522-asg.htm>.

Indeed, U.S. and European approaches to jurisdiction are strikingly different. Some differences concern specific bases of jurisdiction. Does “doing business” create a sufficient connection to the defendant for the assertion of jurisdiction? Many Americans still think so,<sup>14</sup> while Europeans disagree strongly.<sup>15</sup> Can jurisdiction be based on mere service of process in the forum state? Again, the answer is yes under American law,<sup>16</sup> no under European law.<sup>17</sup> Is it justified to assert jurisdiction in product liability at the place of the injury even if the injurer could not possibly have expected the injury to occur there? Here, Europeans generally see no problems,<sup>18</sup> while Americans believe this would violate the defendant’s constitutional rights.<sup>19</sup> Does the plaintiff’s nationality create a sufficiently close relationship to assert jurisdiction over a defendant

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14. See, e.g., *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 442 (1952); RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 216–22 (5th ed. 2006). But see Kevin M. Clermont, *Jurisdictional Salvation and the Hague Treaty*, 85 CORNELL L. REV. 89, 115 (1999) (proposing to abolish doing business jurisdiction in the United States); Stephen B. Burbank, *All the World His Stage*, 52 AM. J. COMP. L. 741, 749–53 (2004) (book review) (questioning the viability of this ground of jurisdiction in its traditional form).

15. See ROLF A. SCHÜTZE, DIE ALLZUSTÄNDIGKEIT AMERIKANISCHER GERICHTE 14–15 (2003).

16. See *Burnham v. Super. Ct. of Cal.*, 495 U.S. 604 (1990); for application to international cases, see, e.g., *Amusement Equip., Inc. v. Mordelt*, 779 F.2d 264 (5th Cir. 1985). But see RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 421, n. 5 (1987) (“Jurisdiction based on service of process on one only transitorily present in a state is no longer acceptable under international law if that is the only basis for jurisdiction and the action in question is unrelated to that state.”).

17. See Peter F. Schlosser, *Lectures on Civil-Law Litigation Systems and American Cooperation with Those Systems*, 45 U. KAN. L. REV. 9, 20 (1996). For Americans insisting that this basis remain, see Andreas Lowenfeld, *Thoughts about a Multinational Judgments Convention: A Reaction to the von Mehren Report*, 57 LAW & CONTEMP. PROBS. 289, 296 (1994); Peter D. Trooboff, *Proposed Hague Conference General Convention on Jurisdiction and the Recognition and Enforcement of Judgments—Some Thoughts on Finding Solutions to Tough Issues*, in E PLURIBUS UNUM—LIBER AMICORUM GEORGES A.L. DROZ 461, 463 (Alegría Borrás et al. eds., 1996). Others hoped that abolition of tag jurisdiction in a Hague Convention could lead to the elimination of this basis in U.S. jurisdictional law; see Clermont, *supra* note 14, at 115–6; Stephen B. Burbank, *Jurisdiction to Adjudicate: End of the Century or Beginning of the Millennium?*, 7 TUL. J. INT’L & COMP. L. 111, 115–16 (1999).

18. Council Regulation 44/2001, Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, art. 5(3), 2001 O.J. (L 12) 1, 4 (EC) [hereinafter Brussels I]. The precursor to the Regulation was drafted in 1968 (see 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (consolidated version), 1998 O.J. (C 27) 1)); Brussels I is distinct from the Brussels II Regulation, which deals with recognition and enforcement of judgments in family law matters.

19. Ronald A. Brand, *Tort Jurisdiction in a Multilateral Convention: The Lessons of the Due Process Clause and the Brussels Convention*, 24 BROOK. J. INT’L L. 125, 153–55 (1998) (arguing that language in leading cases by the European Court of Justice could lead to assertion of jurisdiction that would be unconstitutional under U.S. law); see also Ronald A. Brand, *Due Process, Jurisdiction and a Hague Judgments Convention*, 60 U. PITT. L. REV. 661, 695 (1999).

with no other connections to that country?<sup>20</sup> Is the presence of a piece of the defendant's property, no matter how small, sufficient for the assertion of unlimited jurisdiction over the defendant?<sup>21</sup> Americans are incredulous and deeply critical of these bases, which are still available in European jurisdictions against non-European defendants.<sup>22</sup>

More general differences concern the style and flexibility of jurisdictional law. American law relies on broad standards of "fairness" and "reasonableness" that are applied in each individual case. This enables the judge to focus on achieving justice in individual cases even if it hampers predictability for the parties. European law, by contrast, uses hard and fast rules that are easier to apply and therefore more predictable but may lead to unjust results in individual cases.<sup>23</sup> In addition, U.S. law provides specific doctrines, such as *forum non conveniens* and antisuit injunctions, that give judges discretion to fine-tune and equilibrate<sup>24</sup> jurisdiction in individual cases. European law is strongly opposed to both doctrines, as the European Court of Justice (ECJ) has recently made clear.<sup>25</sup> Instead, Europeans consider jurisdictional bases non-discretionary, resolving the problem of parallel proceedings through a *lis alibi pendens* rule that uses a strict formal criterion of which court was seized of the matter first.<sup>26</sup>

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20. Code civil [C. civ.] art. 14 (Fr.); see Kevin M. Clermont & John R.B. Palmer, *Exorbitant Jurisdiction*, 58 ME. L. REV. 473, 482–503 (2006).

21. See Zivilprozeßordnung [ZPO] [Civil Procedure Statute] Sept. 12, 1950, Bundesgesetzblatt [BGBl] § 23 (F.R.G.); See also Jurisdiktionsnorm [JN] [Code of Judicial Organization] Reichsgesetzblatt [RGBl] 111/1895, § 99(1) (Austria); see von Mehren, *supra* note 10, at 174–77.

22. See Brussels I, *supra* note 18, art. 4. For reasons for the persistence of these bases in the Brussels Regulation, see *infra* text accompanying notes 272–273. As between member states, these bases are unavailable.

23. Christian Kohler, *Practical Experience of the Brussels Jurisdiction and Judgments Convention in the Six Original States*, 34 INT'L & COMP. L.Q. 563, 582 (1985); von Mehren, *supra* note 10, at 69–72; Trevor C. Hartley, *The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws*, 54 INT'L & COMP. L.Q. 813, 814 (2005). Note that this is not the same as the difference between case law and statutory law. Statutes can be very openly worded, as are many states' long arm statutes that merely invoke the limits of the Constitution; precedential rules formulated by courts, by contrast, can be very precise.

24. For the terminology, see Stephen B. Burbank, *Jurisdictional Equilibration, the Proposed Hague Convention and Progress in National Law*, 49 AM. J. COMP. L. 203, 205–06 (2001); von Mehren, *supra* note 10, at 306.

25. Case C-159/02, *Turner v. Grovit*, 2004 E.C.R. I-3565 (holding antisuit injunctions incompatible with the Brussels Regulation); Case C-281/02, *Owusu v. Jackson*, 2005 E.C.R. I-1383 (holding *forum non conveniens* incompatible with the Brussels Regulation); for critical analyses, see Richard Fentiman, *National Law and the European Jurisdiction Regime*, in INTERNATIONAL CIVIL LITIGATION IN EUROPE AND RELATIONS WITH THIRD STATES 83 (Arnaud Nuyts & Nadine Watté eds., 2005); Hartley, *supra* note 23.

26. Brussels I, *supra* note 18, art. 27.

Still other differences concern sources of law and relevant actors.<sup>27</sup> The U.S. law of jurisdiction has long been constitutionalized, while European law remains sub-constitutional.<sup>28</sup> In the United States, the most important source of rules and principles on jurisdiction is the U.S. Constitution, notably its Due Process Clause.<sup>29</sup> In Europe, by contrast, the most important source is a subconstitutional legislative instrument, the Brussels I Judgment Regulation (Brussels Regulation);<sup>30</sup> the basis in national legal systems is statutory law.<sup>31</sup> As a consequence, different actors have been primarily involved in the development of jurisdictional rules and principles. In the United States, this task has been left almost exclusively to judges.<sup>32</sup> In Europe, on the other hand, the task traditionally falls mostly to legislators, though the ECJ plays an increasingly important role.

These differences are not only significant, but they are also difficult to surmount. This became clear during negotiations at the Hague towards a Worldwide Convention on Jurisdiction and the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters. In 1996, the Hague Conference on Private International Law had accepted a proposal by the American delegation to develop such an instrument.<sup>33</sup> Although expectations and ambitions had been grand,<sup>34</sup> negotiations soon proved difficult.<sup>35</sup> Some compromises on individual issues were reached,<sup>36</sup>

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27. See von Mehren, *supra* note 10, at 72–74.

28. But see *infra* part IV.A for the plaintiff's quasi-constitutional right to a forum.

29. The Full Faith and Credit Clause has not been an important source after the Supreme Court decision in *Pennoyer v. Neff*, 95 U.S. 714 (1877); see *infra* note 144.

30. Brussels I, *supra* note 18.

31. This is not true without exception. The right of Swiss domiciliaries to be sued only in their home forum enjoyed constitutional protection until 1998 in Bundesverfassung art. 59(1). See BAUMGARTNER, *supra* note 10, at 147–49.

32. von Mehren, *supra* note 10, at 95.

33. Hague Conference on Private International Law, *Final Act of the Eighteenth Session*, in PROCEEDINGS OF THE EIGHTEENTH SESSION 29, 47 (1996) (The Hague, 1999).

34. Arthur T. von Mehren, *Recognition of United States Judgments Abroad and Foreign Judgments in the United States: Would an International Convention Be Useful?*, 57 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT [RABELSZ] 449 (1993); see also Arthur T. von Mehren, *Recognition and Enforcement of Foreign Judgments—A New Approach for the Hague Conference?*, 57 LAW & CONTEMP. PROBS. 271 (1994); Haimo Schack, *Perspektiven eines weltweiten Anerkennungs- und Vollstreckungsübereinkommens*, 1 ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT [ZEU P] 306, 317–32 (1993).

35. For a detailed account, see David McClean, *The Hague Conference's Judgments Project*, in REFORM AND DEVELOPMENT OF PRIVATE INTERNATIONAL LAW—ESSAYS IN HONOUR OF SIR PETER NORTH 255 (John Fawcett ed., 2002).

36. For examples of compromises, see Arthur T. von Mehren, *Drafting a Convention on International Jurisdiction and the Effects of Foreign Judgments Acceptable World-wide: Can the Hague Conference Project Succeed?*, 49 AM. J. COMP. L. 191, 195–96 (2001); Ronald A. Brand, *Current Problems, Common Ground, and First Principles: Restructuring the Preliminary Draft Convention Text*, in A GLOBAL LAW OF JURISDICTION AND JUDGMENTS:

but a draft convention circulated in 1999<sup>37</sup> proved so unpopular, especially with the U.S. delegation,<sup>38</sup> that the intended vote on the convention in 2000 was postponed. Instead of moving forward with the convention as planned, the delegations scaled back the negotiations to a convention on choice of court agreements, which was concluded in the summer of 2005<sup>39</sup> but has not, as of September 2006, been signed by any member state.<sup>40</sup> Regardless of whether this convention will be successful,<sup>41</sup> it represents a serious retreat from the much greater ambitions associated with the original project.

These differences between U.S. and European approaches to jurisdiction and the difficulties facing unification projects present a serious challenge to the convergence thesis. Traditional explanations for the intractability of the differences seem insufficient. In theory, the differences could be attributed to a lack of interdependence and communication. But there has been ample exposure, debate, and good will, both during negotiations in the Hague and amongst scholars in general, and still no substantial agreement has emerged. Differences could also arise from divergent goals. Indeed, to some extent private litigation has a stronger regulatory nature in the United States than it does in Europe.<sup>42</sup> Yet by and

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LESSONS FROM THE HAGUE CONVENTION 75 (John J. Barceló III & Kevin M. Clermont eds., 2002).

37. Hague Conference on Private International Law—Enforcement of Judgments, *Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters adopted by the Special Commission and Report by Peter Nygh and Fausto Pocar*, Prelim. Doc. No. 11 (August 2000), available at <http://www.hcch.net/upload/wop/jdgmpl1.pdf>.

38. See Letter from Jeffrey Kovar, Assistant Legal Advisor for Private Int'l Law, U.S. Dept. of State, to J.H.A. van Loon, Secretary General, Hague Conf. on Private Int'l Law (Feb. 22, 2000), 25 DAJV-NEWSLETTER 44 (2000); available at <http://legalminds.lp.findlaw.com/list/intpil/doc00003.doc>; von Mehren, *supra* note 36, at 194–196.

39. Hague Convention on Choice of Court Agreements, June 30, 2005 [hereinafter Hague Convention], 44 I.L.M. 1294 (2005).

40. Status Table of the Hague Convention, available at [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=98](http://www.hcch.net/index_en.php?act=conventions.status&cid=98).

41. For positive views, see Ronald A. Brand, *The New Hague Convention on Choice of Court Agreements*, AM. SOC'Y INT'L L. INSIGHTS, July 26, 2005, <http://www.asil.org/insights/2005/07/insights050726.html>; Giesela Rühl, *Das Haager Übereinkommen über die Vereinbarung gerichtlicher Zuständigkeiten: Rückschritt oder Fortschritt?* 25 PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS (IPRAX) 410 (2005); Louise Ellen Teitz, *The Hague Choice of Court Convention: Validating Party Autonomy and Providing an Alternative to Arbitration*, 53 AM. J. COMP. L. 543 (2005). For some doubts, see CHRISTIAN THIELE, *The Hague Convention on Choice of Court Agreements—Was it Worth the Effort?* in CONFLICT OF LAWS IN A GLOBALIZING WORLD: ESSAYS IN MEMORY OF ARTHUR T. VON MEHREN (Eckart Gottschalk, Ralf Michaels, Giesela Rühl & Jan von Hein eds., forthcoming 2007).

42. See Paul D. Carrington, *The American Tradition of Private Law Enforcement*, 5 GERMAN L.J. 1413 (2004), available at <http://www.germanlawjournal.com/article.php?>



large Americans and Europeans pursue similar goals with their laws on jurisdiction,<sup>43</sup> and still each side is deeply critical of the methods the other side employs to reach those goals. Differences could reflect varied cultural values. But general cultural differences are not significant enough to explain the substantial differences in such a technical area as the law of jurisdiction.

### *C. The Argument from Legal Paradigms*

This Article suggests a response to these challenges that builds on the work of both functional comparatists and students of culture, but provides a way to explain the persistence of differences that overcomes the limits of both: legal paradigms. The hypothesis is that Americans and Europeans do not simply think differently about how to apply jurisdiction; they even think differently about what jurisdiction is. Americans and Europeans disagree on the answers because they disagree on the relevant questions. Similarities of goals notwithstanding, each side remains in its own paradigm of jurisdiction, and these paradigms are significantly different. Paradigms explain not only why these differences exist, but also why they remain stable despite all the transatlantic efforts at agreement and the relative similarity of goals and values. This explanation is seemingly paradoxical: convergence and unification are difficult not because of differences but because of similarities. Precisely because American and European law provide functionally equivalent methods for resolving the same problems, they cannot agree on, much less unify, these methods.

Propounding the notion of paradigmatic difference between U.S. and European thinking about jurisdiction makes important contributions both to the law of jurisdiction and to the theories and methods of comparative law. The contribution to the law of jurisdiction is both explanatory and evaluative. On a macro-level, exploring paradigmatic difference contributes to a mutual understanding of the structure within which Americans and Europeans think about issues of jurisdiction. Broadly, Americans adopt an “in or out” paradigm that is vertical, unilateral, domestic, and political, while Europeans adopt an “us or them” paradigm that is horizontal, multilateral, international, and apolitical. On a micro-level, understanding paradigmatic difference can provide a single explanation for a wide variety of differences between U.S. and European jurisdictional theory and practice. Taken together, paradigmatic difference suggests mutual criticism tends to be biased. As long as each side argues

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id=523; Hannah L. Buxbaum, *Transnational Regulatory Litigation*, 46 VA. J. INT'L L. 251 (2006).

43. See SCOLES ET AL., *supra* note 9; *see also infra*, text accompanying notes 57, 58.

from within its own paradigm, the approach taken by the other side must necessarily seem deficient.

The second field to which the idea of a paradigmatic difference makes a contribution is the theory of convergence, legal unification, and comparative law. The common understanding is that unification is easy where legal systems are functionally equivalent because each side agrees on the goals and disagrees only on the means. Unification is difficult, according to this account, only where goal preferences differ strongly. By contrast, this Article shows how functional equivalence between different legal orders makes unification more difficult to achieve. Precisely where different legal orders reach similar results by different means, within different legal paradigms, it is very costly for them to unify those means, while the benefits from unification are rather slim. Although the theory of legal paradigms builds on functionalist comparative law, it represents a significant elaboration that can account for difference and for culture.

This Article proceeds as follows. Part II.A. presents two explanations frequently given to explain the differences between U.S. and European jurisdictional law, and shows that both are ultimately insufficient. Part II.B. introduces functional comparison and show how it can actually help stabilize, rather than overcome, difference. Part II.C. introduces the concept of paradigms and paradigmatic difference as a more promising explanation for these differences.

Part III develops this hypothesis by laying out two different paradigms underlying different legal systems—a vertical, domestic, unilateral, political paradigm for U.S. law (Part III.A.), and a horizontal, international, multilateral, apolitical paradigm for European laws (Part III.B.). An important finding in these two sections is that each of the paradigms has ways of accounting for those considerations that are fundamental to the other paradigm, but in different ways: through subsumption under its own terms, and through externalization to other institutions than the law of jurisdiction.

Part IV applies the findings of paradigmatic difference to five specific issues on which Americans and Europeans disagree: the role of due process; the discrimination against foreign plaintiffs in U.S. courts and against foreign defendants in European courts; the relevance of state boundaries and extraterritoriality; attitudes towards *forum non conveniens*, antisuit injunctions, and *lis alibi pendens*; and negotiation styles in the efforts to conclude a worldwide judgments convention in the Hague. Part V concludes.

## II. THEORETICAL FOUNDATIONS

How can the differences between U.S. and European approaches to the law of personal jurisdiction be explained? Are they differences at the level of individual rules and preferences that could be resolved through compromise? Do they reflect differences of culture and societal priorities? Are they rather differences in levels of analysis, wherein Americans and Europeans ask and address entirely different questions? Or are they manifestations of deeper underlying differences between American and European jurisdictional thought? These questions must be answered before chances for mutual understanding can be assessed. While traditional functionalist comparative law cannot account for the differences, once it is enriched with insights from competing theories, a new theory of legal paradigms emerges that can.

### A. *Two Partial Explanations*

#### 1. A Superficial Difference of Form?

The persistent differences between U.S. and European laws of jurisdiction present a puzzle for functionalist comparative law. Comparatists in this camp presume that legal systems differ only in their doctrine but not in their results; functional comparison discovers similar solutions to similar problems.<sup>44</sup> Accordingly, comparatists expect prevailing differences between approaches to jurisdiction to be surmountable through mutual understanding or compromise. They find convergence between approaches either actually occurring or at least possible, and they have had some success in explaining that convergence. Scholars have discovered European equivalents to the U.S. practice of granting jurisdiction based on doing business<sup>45</sup> and U.S. equivalents to unconventional European bases of jurisdiction.<sup>46</sup> They have found European opposition to

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44. The classical locus for this postulate is ZWEIGERT & KÖTZ, *supra*, note 3, at 40; for discussion, see Michaels, *supra* note 3, at 369–72.

45. Ronald A. Brand, *The 1999 Hague Preliminary Draft Convention Text on Jurisdiction and Judgments: A View From the United States*, in THE HAGUE PRELIMINARY DRAFT CONVENTION ON JURISDICTION AND JUDGMENTS 3, 17–28 (Fausto Pocar & Constanza Honorati eds., 2005); See Harald Müller, DIE GERICHTSPFLICHTIGKEIT WEGEN “DOING BUSINESS”: EIN VERGLEICH ZWISCHEN DEM US-AMERIKANISCHEN UND DEM DEUTSCHEN ZUSTÄNDIGKEITSSYSTEM 221–55 (1992).

46. See generally Ronald A. Brand, *Jurisdictional Common Ground: In Search of a Global Convention*, in LAW AND JUSTICE IN A MULTISTATE WORLD—ESSAYS IN HONOR OF ARTHUR T. VON MEHREN 11, 20–21 (James A.R. Nafziger & Symeon C. Symeonides eds., 2002).

*forum non conveniens* to be less consistent than claimed<sup>47</sup> and U.S. reliance on tag jurisdiction less strongly supported than thought.<sup>48</sup> Where differences exist, functional comparatists have set out to determine which of the solutions is superior: they have been willing to accept European solutions into U.S. law when those solutions seemed more rational—for example, the existence of detailed rules<sup>49</sup>—and they have suggested Europeans adopt U.S. solutions where those seemed superior—for example, constitutionalization of jurisdictional rules.<sup>50</sup>

All this comparative law work is extremely important. It has provided invaluable insights into functional similarities between seemingly different legal systems. It has shown that the differences between U.S. and European law are relative and contingent. Some differences exist more in perception than in reality, some are real but not decisive because they do not lead to different results, and others are real and decisive but not central. Indeed, without such comparative analysis, the Hague negotiations would not have been possible.

However, the strength of the analysis is its greatest weakness. If indeed the differences are negligible, then it is unclear why they persist and why negotiations at the Hague to overcome them failed. If indeed Americans and Europeans pursue the same goals with their laws on jurisdiction, it is unclear why no convention can be concluded that is based on these similar goals. After all, the negotiations at the Hague were an extremely serious and thorough attempt at mutual understanding between experts. Their ultimate failure is even more remarkable given that the negotiators, as experts in conflict of laws, can be expected to have even more in common than the societies they represent.<sup>51</sup> If not even these serious negotiations led to agreement, it seems implausible to argue that the problem is lack of debate or good will. This suggests these differences are not themselves decisive, but rather are symptomatic of deeper rifts.

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47. See, e.g., ARNAUD NUYTS, L'EXCEPTION DE FORUM NON CONVENIENS (ÉTUDE DE DROIT INTERNATIONAL PRIVÉ COMPARÉ) 368–456 (2003).

48. Kevin M. Clermont, *Jurisdictional Salvation and the Hague Treaty*, 85 CORNELL L. REV. 89, 111–12 (1999).

49. *Id.* at 107–10; Kevin M. Clermont, *The Role of Private International Law in the United States: Beating the Not-Quite-Dead Horse of Jurisdiction*, 2 CILE STUDIES 75, 104, 110–11 (2005).

50. Arnaud Nuyts, *Due Process and Fair Trial: Jurisdiction in the United States and in Europe Compared*, 2 CILE STUDIES 27, 48–60 (2005).

51. See the analysis by Paul B. Stephan, *The Futility of Unification and Harmonization in International Commercial Law*, 39 VA. J. INT'L L. 743, 753–61 (1999).

## 2. A Deep Difference of Cultural Values?

Can legal culture account for the differences? Indeed, some point to cultural and sociological differences between Americans and Europeans as an explanation for the differences in approach to jurisdiction.<sup>52</sup> Since culture is an amorphous concept, it may be helpful to turn to Lawrence Friedman's distinction between two kinds of legal culture.<sup>53</sup> External legal culture describes the general attitude of society towards the law and the goals it assigns to law. Internal legal culture, by contrast, describes the thoughts, modes, and institutions of participants in the legal system.

Although a comprehensive analysis is beyond what can be done for this Article, the explanation from external culture seems implausible. For differences in external culture to explain the differences in jurisdictional law, two basic assumptions would have to be met: first, a country's law of jurisdiction must reflect the attitudes of its people; second, Americans and Europeans must have different attitudes regarding the issues relevant to the law of jurisdiction. Both assumptions, though certainly not wrong, have their explanatory limits.

First, the intuition that the law reflects a society's preferences is problematic. Even if societies as such have preferences that transcend the differences between the preferences held by their members, it is doubtful that such preferences are reflected directly in the "semi-autonomous"<sup>54</sup> field of law. Public choice theory has shown that even statutory law in democratic countries reflects the preferences of legislators and highly interested, well-organized lobbying groups rather than those of society at large. Judge-made law is a similarly inexact mechanism for adapting the law to such extralegal preferences, especially in rather technical and procedural areas like the law of jurisdiction. The

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52. See Willibald Posch, *Resolving Business Disputes Through Litigation or Other Alternatives: The Effects of Jurisdictional Rules and Recognition Practice*, 26 HOUS. J. INT'L L. 363, 383 (2004); Stephen B. Burbank, *Jurisdictional Conflict and Jurisdictional Equilibration: Paths to a Via Media?*, 26 HOUS. J. INT'L L. 385, 392-93 (2004). In a more general context, Oscar Chase has recently tried to explain American peculiarities with the special culture of the United States. Oscar G. Chase, *American "Exceptionalism" and Comparative Procedure*, 50 AM. J. COMP. L. 277 (2002); see also OSCAR G. CHASE, *LAW, CULTURE, AND RITUAL: DISPUTING SYSTEMS IN CROSS-CULTURAL CONTEXT* 78-79, 92-93 (2005) (explaining discretion in personal jurisdiction with American exceptionalism).

53. LAWRENCE M. FRIEDMAN, *THE LEGAL SYSTEM* 223 (1975) ("The external legal culture is the legal culture of the general population; the internal legal culture is the legal culture of those members of society who perform specialized legal tasks."). For a critical analysis, see Roger Cotterrell, *The Concept of Legal Cultures*, in *COMPARING LEGAL CULTURES* 13, 17 (David Nelken ed., 1997).

54. Sally Falk Moore, *Law and Social Change: The Semi-Autonomous Field as an Appropriate Subject of Study*, 7 LAW & SOC'Y REV. 719 (1973).

explanations from external culture therefore risk circularity:<sup>55</sup> legal rules and institutions are thought to mirror a society's cultural preferences, but then the only way to determine the society's preferences is to look at its laws. Americans have the jurisdictional regime they have because they want it, and we know they want this regime because they have not changed it. Whether this congruence of legal regime and societal preferences exists is unknowable because the hypothesis cannot be tested or falsified.

Second, even if one grants the logical priority of societal preferences over legal regimes, it is still doubtful whether attitudinal differences between Americans and Europeans are significant enough to explain the differences in approach.<sup>56</sup> American exceptionalism, a popular topic at least since de Tocqueville,<sup>57</sup> has often been exaggerated. Extreme cultural differences would be counterintuitive between societies that are so similar in economic, political, and historical respects.

If external legal culture does not provide a sufficient explanation, then internal legal culture well may. Indeed, the different ways in which Americans and Europeans talk about jurisdiction and the different issues they consider relevant suggest a difference in internal legal culture. American and European lawyers think differently about jurisdictional issues because each side is constrained by the framework within which it conceives of the subject.

However, this explanation has two shortcomings as well. First, its focus on the views of individual actors in the legal system is unsatisfactory: individual views are hard to determine, and the rationality of the legal system as a whole likely transcends that of any one participant in it. The knowledge sought is therefore rather one of the system itself than of its participants. Second, the explanation does not explain in what specific way the internal legal culture of one side differs from the other. Again, simply to say that the laws are different because the internal legal cultures are different becomes a circular explanation if the claim of difference between legal cultures merely restates the differences between laws. What is required is a more specific analysis of the relationship between individual legal provisions and institutions and the legal system as

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55. William B. Ewald, *What's So Special About American Law?*, 26 OKLA. CITY U. L. REV. 1083, 1098 (2001); David Nelken, *Towards a Sociology of Legal Adaptation*, in ADAPTING LEGAL CULTURES 7, 27 (David Nelken & Johannes Feest eds., 2001).

56. Clermont, *supra* note 49, at 96.

57. See Chase, *American "Exceptionalism"*, *supra* note 52, for a discussion of the influence of American culture on civil procedure; for a recent overview of American exceptionalism, see Mark B. Rotenberg, *America's Ambiguous Exceptionalism*, 3 U. ST. THOMAS L.J. 188 (2005).

a whole, between the goals of the law of jurisdiction broadly understood and the means used to achieve those goals.

### B. *Functional Equivalence*

A proper explanation for the differences between U.S. and European thinking about jurisdiction must pull these insights together. On the one hand, it must remain within the law without taking recourse to general societal culture, because culture and its relation to the legal rules and institutions are unclear. On the other hand, it must go beyond not only the realm of mere individual rules, but also that of style and of institutions and sources of law. It must show how the individual peculiarities of legal systems are linked to each other to create a coherent whole. In short, the explanation must encompass the law as a whole, but nothing beyond the law. What starts as a functionalist micro-comparison between individual rules becomes a macro-comparison between entire systems of law.

#### 1. A Difference of Levels of Analysis?

Indeed, closer analysis reveals that not one but (at least) two functions are present in jurisdictional law and theory in the United States as in Europe. The U.S. Supreme Court formulated these two functions of the law of jurisdiction as follows: “It protects the defendant against the burden of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.”<sup>58</sup> These two functions are not peculiar to the United States; they are also fundamental to European jurisdictional law.<sup>59</sup>

Although Americans and Europeans agree on these two objectives, they do not use their laws on jurisdiction for the same functions. Unknowingly, American and European approaches to jurisdiction are responses to different questions asked, as an insightful recent article by Arnaud Nuyts shows.<sup>60</sup> Nuyts’ main point is that the principles developed under the Due Process Clause of the U.S. Constitution and the rules of the Brussels Regulation “each *operate at a different level* and accordingly

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58. *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 292 (1980). The respective role of these two goals is unclear in view of *Insurance Corp. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982).

59. Ralf Michaels, *Re-Placements—Jurisdiction for Contracts and Torts under the Brussels I Regulation when Arts. 5(1) and 5(3) Do Not Designate a Place in a Member State*, in *INTERNATIONAL CIVIL LITIGATION IN EUROPE AND RELATIONS WITH THIRD STATES*, *supra* note 25, at 151.

60. Nuyts, *supra* note 50.

cannot be directly compared.”<sup>61</sup> If the American focus is on the protection of due process, while the European emphasis is on listing available bases of jurisdiction, this is not just another difference between the two approaches; it is evidence that the U.S. Constitution and the Brussels Regulation serve different purposes. What Americans mean by “jurisdiction” is simply not the same as what Europeans mean by the term. For Nuyts, it follows that the U.S. Constitution and the Brussels Regulation cannot be meaningfully compared, because they are not functionally equivalent. A proper approach must compare rules serving the same functions.<sup>62</sup> It must find the functional equivalent for the Due Process Clause in European law, and the functional equivalent for the Brussels Regulation in U.S. law.

The first of the two levels of analysis Nuyts proposes is the delimitation of the outer limits of jurisdiction. In the United States, this level is occupied by the U.S. Supreme Court, which has been careful to make clear that it identifies only the boundaries of jurisdiction, not jurisdictional rules themselves.<sup>63</sup> A “one-step test” of jurisdiction, whereby jurisdiction would simply be conferred by the U.S. Constitution,<sup>64</sup> is not in accordance with U.S. law. It is often claimed that such constitutional control of jurisdiction is absent or at least deficient in the European context.<sup>65</sup> Nuyts points out, however, that Article 6(1) of the European Convention on Human Rights (ECHR), the safeguard of a fair trial in Europe, has the potential to perform the same functions as the Due Process Clause in the United States.<sup>66</sup> Indeed, he can cite to one little known decision of the European Commission on Human Rights for limiting jurisdiction under traditional English law.<sup>67</sup>

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61. *Id.* at 30 (emphasis in original).

62. ZWEIGERT & KÖTZ, *supra* note 3, at 34.

63. *See* Asahi Metal Indus. Co., Ltd. v. Super. Ct. of Cal., 480 U.S. 102, 106 (1987); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 462 (1985); Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 413 (1984); Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 775 (1984); *World-Wide Volkswagen*, 444 U.S. at 292.

64. *See* Hall v. Helicopteros Nacionales de Colom., 638 S.W.2d 870 (Tex. 1982).

65. For developments in German law, see von Mehren, *supra* note 10, at 142–178.

66. NUYTS, *supra* note 47, at 50–60; *see also* Pascal Grolimund, *Human Rights and Jurisdiction: General Observations and Impact on the Doctrines of Forum Non Conveniens and Forum Conveniens*, 4 EUR. J.L. REFORM 87 (2002); Emmanuel Guinchard, *Procès équitable (article 6 CESDH) et droit international privé*, in INTERNATIONAL CIVIL LITIGATION IN EUROPE AND THIRD STATES 199 (Arnaud Nuyts & Nadine Watté eds., 2005); Dany Cohen, *La Convention européenne des droits de l’homme et le droit international privé français*, 78 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 451, 463 (1989); *contra* Jonathan Hill, *The Exercise of Jurisdiction in Private International Law*, in ASSERTING JURISDICTION: INTERNATIONAL AND EUROPEAN PERSPECTIVES 39, 40–41 (Capps, Evans & Konstadinidis eds., 2003).

67. Decision of the European Commission on Human Rights, Complaint No. 6200/73, May 13, 1976 (unpublished), in 2 DIGEST OF STRASBOURG CASE-LAW RELATING TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS 269 (1984); *see also* ADRIAN BRIGGS & PETER



The second level in Nuyts' proposed two-level analysis is the elaboration of specific rules. In Europe, the elaboration of such rules is carried out in the provisions of the Brussels Regulation.<sup>68</sup> Although in the United States such rules are often all but ignored in practice, the Constitution alone is not sufficient here, either. Jurisdiction of state courts is a matter of state law and therefore requires a basis in state law, either in common law or in a statutory provision.<sup>69</sup> The same is true, with exceptions (especially for federal statutory authority), for federal courts, whose jurisdiction is governed by the rules of the state in which they are situated.<sup>70</sup> The statutes of many states do not add any further restrictions to those granted by the U.S. Constitution; they extend jurisdiction according to the limits of the U.S. Constitution.<sup>71</sup> But some states such as New York that deal frequently with international commercial litigation have rules on jurisdiction that are hardly less specific than the rules of the Brussels Regulation.<sup>72</sup> Nuyts argues that this second step of jurisdictional analysis should be enhanced in the United States.<sup>73</sup>

Nuyts' analysis is eye-opening, because it moves into the spotlight of jurisdictional analysis two bodies of law that have traditionally been largely ignored: the European Convention on Human Rights and the states' long-arm statutes in the United States. Moreover, the two-level analysis provides a good explanation for many of the differences between U.S. and European law on jurisdiction. If the function of U.S. law is the protection of substantive rights of defendants, it is not surprising that U.S. law is based on the Constitution, shaped by judges, formulated in standards and principles rather than rules, and aimed at individual cases rather than general consistency. The case law of the European Court of Human Rights is quite similar in all these regards, and if indeed

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REES, CIVIL JURISDICTION AND JUDGMENTS 12, 19 (Peter Rees ed., 3d ed. 2002). Since all these decisions and authors concerned English law of jurisdiction, which is in many ways similar to that in the United States, they do not represent clear precedents for a similar function of ECHR Art. 6(1) for civil law rules or even the Brussels I Regulation. *But see* Cass. civ., Mar. 30, 2004, JCP 2004 II 10097 at 1129 (discussing but rejecting a violation of Art. 6(1) by French Civil Code Art. 15).

68. *Supra* note 18.

69. Stephen B. Burbank, *Jurisdiction to Adjudicate: End of the Century or Beginning of the Millennium?*, 7 TUL. J. INT'L & COMP. L. 111, 112–14 (1999).

70. FED. R. CIV. P. 4(k)(1)(A); for further exceptions, see FED. R. CIV. P. 4(k)(1)(B) and 4(k)(2).

71. For analysis of this issue, see Douglas D. McFarland, *Dictum Run Wild: How Long-Arm Statutes Extended to the Limits of Due Process*, 84 B.U. L. REV. 491, 525–531 (2004); for a slightly different grouping, see WEINTRAUB, *supra*, note 14, at 203–05.

72. N.Y. C.P.L.R. 302 (McKinney 2003). Some state courts have wrenched restricting language out of shape to achieve as much jurisdiction as permitted. *But see* Schlosser, *supra* note 17, at 21 (“[N]othing exists in civil-law countries which could properly be called a long-arm statute”).

73. Nuyts, *supra* note 50, at 66–67; *see also* Clermont, *supra* note 49, at 104, 110–12.

that Court accepted Nuyts' challenge and took on jurisdiction, there is no reason to think it would act much differently. On the other hand, where U.S. courts are asked to interpret long arm statutes independently from the U.S. Constitution, they defer to statutory texts, apply hard and fast rules rather than open standards, and thereby enhance consistency rather than justice in the individual case.<sup>74</sup>

Theoretically, U.S. and European law could converge on the path Nuyts describes. More constitutional control of jurisdiction in Europe would soften criticism of European law as unjust. If American law of jurisdiction developed more in state law and through legislators, the Constitution could be reserved, as has been demanded repeatedly, to the role of an outer limit. At present, however, neither is the case, and this is a situation that Nuyts' analysis alone cannot explain. If "it is not difficult to find examples in the Brussels Convention/Regulation where the fair trial doctrine could alter traditional ways in which the rules of jurisdiction are applied,"<sup>75</sup> an explanation is needed for why such alterations have not yet taken place. Nuyts' comparison of the two steps cannot explain why each legal system concentrates its debates on only one of the two levels.

## 2. Functional Equivalence and the Stability of Difference

Nuyts' analysis provides a good tool to explain the difference, but not its persistence. An explanation for this persistence lies in path dependency. The fact that one of the levels of jurisdictional analysis is inadequately elaborated in each of the two legal systems means that the respective institution acting mainly on one level must also fulfill the requirements posed on the other level. This explains why the U.S. Constitution and the Brussels Regulation are more important, respectively, than the long arm statutes and the European Convention on Human Rights. It also explains why they can remain stronger.<sup>76</sup> The Brussels Regulation and the U.S. Constitution are, in fact, functionally equivalent, because each of them fulfills both functions.

In the United States, the Due Process Clause is used for far more than determination of broad outer limits;<sup>77</sup> by now it provides, together

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74. Clermont, *supra* note 49, at 102–103, 105.

75. Nuyts, *supra* note 50, at 58.

76. This does not rule out other possible explanations. For example, both the European Convention on Human Rights and the European Court of Human Rights are much younger and weaker than the U.S. Constitution and the U.S. Supreme Court. However, this explanation is made less plausible in view of the fact that the European Court of Human Rights has been quite active in other areas of the law, such as privacy and discrimination law.

77. Jay Conison, *What Does Due Process Have to Do with Jurisdiction?*, 46 RUTGERS L. REV. 1071 (1994).

with the case law of the U.S. Supreme Court, a detailed system of rules and principles of jurisdiction. This was not always so. James Weinstein has shown how much of today's jurisdictional law was developed originally as sub-constitutional federal law, not as constitutional law.<sup>78</sup> Yet after the *Pennoyer* decision in 1878, the Constitution became the most important source of jurisdictional law, and when federal common law was all but abolished in 1938,<sup>79</sup> further development moved, unlike other areas of the law, down to the states, but rather up to the level of the U.S. Constitution. Some of the detailed rules developed by the Supreme Court cannot be derived from the Due Process Clause, either because they have nothing to do with due process,<sup>80</sup> or because they are incompatible with the normal interpretation of the clause.<sup>81</sup> Nonetheless, since state law, both statutory and common law, has been all but irrelevant in the development of jurisdictional legal thinking, the task of formulating jurisdictional rules remained, necessarily, with the U.S. Constitution and the courts applying it. Even if detailed jurisdictional rules exist in state law, courts nonetheless frequently focus almost their entire analysis on the Constitution.<sup>82</sup> Although critics ask the Supreme Court to restrict its opinions on jurisdiction to the prevention of truly outrageous violations of due process,<sup>83</sup> path dependency ensures that the role of the Due Process Clause remains prominent. Since U.S. Constitutional jurisprudence is now relatively detailed, state legislators could codify these rules or restrict jurisdiction further, but there is no political incentive for them to do either.

In Europe, the opposite is true. The ECJ has developed the seemingly technical rules of the Brussels Regulation into a system in which the protection of defendants, codified in Article 2 (which gives general jurisdiction to the courts at the defendant's domicile) has quasi-constitutional status.<sup>84</sup> One may argue that these restrictions are not part of the Regulation itself. However, like in the United States, path

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78. James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169, 192–204 (2004) (analyzing cases before *Pennoyer v. Neff* that emphasized the service requirement for jurisdiction).

79. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

80. Weinstein, *supra* note 78, at 174 (“Nor will the Court ever be able to fully explain in due process terms rules formulated primarily to vindicate structural values rather than individual rights.”); *see also* Clermont, *supra* note 49, at 101 (“The well-known failures of the current law flow from the U.S. Supreme Court trying to do too much in shaping that law out of the few bare words of the Constitution.”).

81. Weinstein, *supra* note 78, at 270–276.

82. *See, e.g., Int’l Techs. Consultants, Inc. v. Euroglas S.A.*, 107 F.3d 386, 391, 393 (6th Cir. 1997).

83. *See, e.g., Russell J. Weintraub, Due Process Limitations on the Personal Jurisdiction of State Courts: Time for Change*, 63 OR. L. REV. 485, 527–28 (1984).

84. *See infra* Part III.B.

dependency makes the state of affairs relatively stable. The more willing the Court of Justice is to read restrictions into the text of the Brussels Regulation, the less desirable or necessary it becomes for other institutions like the European Court of Human Rights to interfere on the basis of other texts.

### C. Paradigmatic Difference

Path dependency can explain why difference exist, but cannot, by itself, account for what constitutes this difference. This is where paradigms become attractive.

#### 1. The Idea of Legal Paradigms

Although the concept of the paradigm is frequently invoked without clear definition, it is possible to develop a sufficiently clear concept for the purpose of comparative law. Mark Van Hoecke and Mark Warrington, drawing on Thomas Kuhn,<sup>85</sup> define a paradigm as

the common framework within which theories are developed and scientific discussions are pursued. It implies a common scientific language, a common set of concepts and a common basic world view. If one does not accept the commonly used concepts and/or the commonly accepted ideology, it is no longer possible to develop theories within that science as it has been traditionally conceived.<sup>86</sup>

A legal paradigm is, thus, a thought pattern, an epistemic background for analysis, the way participants of a legal system discuss matters of jurisdiction. A paradigm does not define specific rules or institutions—different views on almost any issue are possible within one paradigm. Instead, a paradigm defines what questions are relevant for analysis and what kinds of factors can be relevant. Since paradigms are often unstated, they must be induced from the actual practice of participants in the analysis. The way judges and scholars argue about issues of jurisdiction reveals their (often unstated) basic understanding of jurisdiction.

Paradigms are different from *principles*. Principles bring coherence to an otherwise seemingly disparate body of case law by revealing basic valuations underlying whole areas of the law, provided either explicitly

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85. THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 11, *passim* (2d ed. 1970).

86. Mark Van Hoecke & Mark Warrington, *Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law*, 47 INT'L & COMP. L.Q. 495, 513 (1998).

by lawmakers or implicitly by the development of the law. For example, the general idea that plaintiffs must seek out defendants (*actor sequitur forum rei*), often invoked by the ECJ for the interpretation of rules, is a principle of European jurisdictional law.<sup>87</sup> This focus on broad areas of the law is a quality principles share with paradigms. But principles are not paradigms. While principles determine, at least to some degree, the *answers* to questions, paradigms determine the *structure* in which questions are asked and answered. Grossly divergent answers to a question are impossible within one principle, but they are quite possible within one paradigm. Principles are a matter for debate within a legal community; paradigms are the epistemic frameworks within which these debates take place. The *actor sequitur forum rei* principle can be explained on the basis of the European paradigm of jurisdiction,<sup>88</sup> but it is not a necessary part of that paradigm.

Paradigms also differ from *concepts*. Of course, saying that Americans and Europeans understand the term jurisdiction differently implies that they have different concepts of jurisdiction. But paradigms are more than concepts because they contain not just the meaning of a particular institution, but rather the whole set of instruments, argumentative modes, and theories connected with this institution, as well as other, related institutions. An analysis of jurisdiction as a concept will focus on what that notion implies in a given legal system. An analysis of the paradigm of jurisdiction will focus also on related doctrines and their interaction and mutual interdependency with the institution properly called jurisdiction.

Paradigms differ from *theories*.<sup>89</sup> Both paradigms and theories of jurisdiction provide modes of analysis considered appropriate for a certain legal issue, but there are three important differences. First, paradigms act on a more abstract and general level than theories; indeed, they can encompass several theories. For example, different theories have been developed for U.S. law of jurisdiction—power theories, relational theories, fairness and convenience theories. While these theories compete with each other, they are all developed within, and compatible with, one paradigm of jurisdiction.<sup>90</sup> Second, theories can be tested and falsified by results; one theory is superior to another if it can better account for specific results. Paradigms, by contrast, are compatible with different

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87. See, e.g., Case C-412/98, Group Josi Reinsurance Co. SA v. Universal Gen. Ins. Co., 2000 E.C.R. I-5925, paras. 34–35; NUYTS, *supra* note 47, at 672–76. For a U.S. law perspective, cf. Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 667 (1988) (“general jurisdiction should be retained solely at a defendant’s home base”).

88. See *infra*, part IV.B.

89. Legal theory is a problematic concept, too. See James Penner, *Decent Burials for Dead Concepts*, 58 CURRENT LEGAL PROBS. 313 (2005).

90. See *infra* Part III.A.

results. They can be tested and falsified, not against results, but against modes of thought and types of argument. Specific arguments and theories may be more compatible with one paradigm than with another, as will be shown with the different U.S. theories in the European context.<sup>91</sup> Third, and perhaps most importantly, theories are necessarily manifest, while paradigms can be latent. In this regard, analysis of paradigms starts where theories end, because such analysis can reveal underlying, yet unrecognized, similarities between different theories.

In their focus on latent, manifest aspects of the law, paradigms share characteristics with external legal culture or *mentalité*.<sup>92</sup> External legal culture, at least in the way the concept is frequently used in comparative law, denotes an extralegal set of values and practices that explains the behavior of legal actors. It can thus explain different theories of jurisdiction with regard to different institutional and societal factors. For example, the expansive approach that U.S. courts take towards jurisdiction might be explained with the societal emphasis on incentives for plaintiffs and their lawyers, for judges seeking reelections, or the general societal interest in achieving justice for victims. All these explanations focus on factors external to the law. By contrast, a paradigm defines the inner structure of a legal system and the way in which participants discuss it. Its explanations for the arguments made, and the consequences drawn, are intrinsic to the legal system, not extrinsic to it. In this sense, paradigms are more closely related to internal legal culture.

## 2. Subsumption and Externalization of Competing Considerations

It is important to note that paradigms do not reflect differences in values; they reflect different ways of dealing with potentially similar preferences. Nonetheless, values play a unique role in each paradigm. For example, I will argue that the U.S. paradigm of jurisdiction focuses mainly on the vertical relationship between the court and the parties, neglecting the horizontal relationship between different states or countries. This means that certain values—the protection of defendants, for example—can easily be conceptualized, while other, possibly competing values—the protection of legitimate interests of other states—cannot. This does not mean these competing values necessarily play a lesser role in the legal system as a whole, but it does mean that they are more difficult to conceptualize *within* one paradigm. Paradigms require a relative degree of inherent consistency, but they must also account in some way for the internal frictions and tensions of the legal system that tend to un-

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91. *Infra* Part III.B.1.

92. See H. Patrick Glenn, *Legal Cultures and Legal Traditions*, in *EPISTEMOLOGY AND METHODOLOGY OF COMPARATIVE LAW* 7 (Mark Van Hoecke ed., 2004).

dermine this consistency. Paradigms have two specific ways of dealing with considerations that seem to undermine them: one is to subsume them into their own mode of thought; the other is to externalize them to other areas of the law.

Subsumption involves the translation of ideas that are incompatible with a certain paradigm into ideas that are compatible. Although, for instance, the horizontal relation between a court and foreign states cannot be considered as such in a vertical paradigm, it can be considered once it is translated into a vertical relation. This is the case where the Due Process Clause is used to account for the interests of other states.<sup>93</sup> Subsumed considerations are not necessarily less relevant than others. In effect, ideas that are incompatible with a paradigm in their original form may, after their subsumption, be protected just as well as, or even better than, they would in a horizontal paradigm. But they are not protected in their original form—they are protected as considerations that have been remolded to fit the paradigm.

Externalization involves the transposition of ideas that are incompatible with a certain paradigm out of the core institutions associated with the paradigm. In a legal system with a vertical paradigm of jurisdiction, horizontal relations between courts and foreign states can be dealt with by means other than those contained in the law of jurisdiction. For example, the interests of other states can be addressed at the stage of recognition and enforcement<sup>94</sup> or through a political question doctrine.<sup>95</sup> Those alternate methods are then functional equivalents of the law of jurisdiction—they perform the same functions by different means. Again, externalized considerations need not be less relevant for the legal system as a whole.

Subsumption and externalization are by no means peripheral—they are central to the internal consistency of paradigms. Any paradigm alone must necessarily be incomplete. The relative consistency and reduction of complexity a paradigm achieves come at the cost of its inability to account, directly, for the inner frictions existing in any area of the law. Subsumption and externalization are necessary ways to deal with these frictions and complexities. Without them, a paradigm would not be viable, and its description would not be complete.

### 3. Paradigms and Comparative Law

In theory, it may be possible to find paradigms underlying a legal system's conception of jurisdiction by mere analysis of one legal system,

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93. *Infra* Part III.A.3.

94. *Infra* Part III.A.3.

95. *Infra* Part III.A.3.

without regard to other systems. But it would be both insufficient and unwise to do so. It would be insufficient because decisions on international jurisdiction do not occur in isolation but rather in an interplay, willing or not, with the international jurisdiction exercised by foreign courts. It would be unwise because comparison enables a dramatically better view of any legal system, especially because it typically shows elements to be contingent that participants take to be essential. Paradigms are frequently unstated, and participants in legal discourse are frequently unaware of the boundaries set up by the paradigms within which they think. One of the most important insights provided by Kuhn's study on paradigm shift<sup>96</sup> was precisely that the inadequacies and contingencies of a paradigm only become visible when a new paradigm has replaced the earlier one. This external viewpoint that illuminates a paradigm can be provided equally well through comparative law, as Clifford Geertz has emphasized.<sup>97</sup> The alternative paradigm, through which these contingencies become visible, can come from a different legal system. The frequent observation that one cannot completely understand one's own law until one sees it through the eyes of a foreign legal system is particularly apt in the study of paradigms.

A caveat is necessary. A paradigmatic account must be painted with a broad brush. First, some details within each system must be neglected. The aim is to draw an image that, if not complete, is at least accurate. It is not to present each detail but rather to show how essential considerations appear in both paradigms, only in very different forms: as a principle in one and as a mere reflex in the other; at the center of one and externalized to another area of the law by the other. This is how functional equivalence and paradigmatic difference coexist. Second, this Article largely ignores the existing opposition within each tradition to its own paradigm. Kuhn's point that paradigms often experience internal frictions before a shift takes place<sup>98</sup> applies to paradigms of jurisdiction as well. Here, the emphasis lies on presentation of the paradigms as they exist, but that does not imply that they are immutable, nor that they have always characterized the law in the United States and in Europe. Third, however, since paradigms can either subsume or externalize competing considerations, they maintain a certain degree of stability against irritations. Further, this stability ensures that paradigms can maintain their

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96. KUHN, *supra* note 85.

97. CLIFFORD GEERTZ, LOCAL KNOWLEDGE 167–234 (1983). For connections with Kuhn, see CLIFFORD GEERTZ, AVAILABLE LIGHT: ANTHROPOLOGICAL REFLECTIONS ON PHILOSOPHICAL TOPICS 160–66 (2000). See also George Fletcher, *Comparative Law as a Subversive Discipline*, 46 AM. J. COMP. L. 683 (1998).

98. KUHN, *supra* note 85, at 84 (noting, however, that anomalies need not lead to paradigm shifts).



distinct structure over time. In this sense, paradigms are contingent but not arbitrary—they are intrinsic to legal systems.

### III. TWO PARADIGMS OF JURISDICTION

A difference in paradigms can be particularly beneficial in explaining the differences between U.S. and European laws of jurisdiction. The U.S. paradigm, at least after *International Shoe v. Washington*,<sup>99</sup> can be called “in or out”—it is vertical, unilateral, domestic, and political. The European paradigm can be labeled “us or them”—horizontal, multilateral, international, and apolitical. This implies the existence of various interconnected dichotomies. The vertical/horizontal dichotomy describes whether a legal system focuses on the vertical relation between the court and the parties or on the horizontal relation between the forum state and other states. The unilateral/multilateral dichotomy describes whether the approach a legal system takes to issues of jurisdiction could potentially apply without frictions for all other legal systems (multilateral), or whether its focus is on its own relation to the case before it in disregard of potential claims of other legal systems (unilateral). The domestic/international dichotomy is in many ways a combination of these two: it describes whether a legal system regards jurisdictional issues as domestic or as interstate (international) in nature. The political/apolitical dichotomy describes whether a legal system perceives a need to justify politically the exercise of jurisdiction, or whether it thinks of jurisdiction as an apolitical matter that can be justified otherwise.

#### A. “In or out”—*The U.S. Paradigm of Jurisdiction*

In order to test whether the debate over jurisdiction in the United States can be explained with an “in or out” paradigm, I first present the competing normative theories that have been offered for the law of jurisdiction before analyzing how well they fit under the paradigm, and how competing considerations are either subsumed into, or externalized out of, the paradigm.

#### 1. American Thinking About Jurisdiction

Given how uneven the history of the law of jurisdiction has been in the United States, can one really lump all approaches together within one paradigm? A good starting point is the theoretical work performed in the discipline. Arthur von Mehren identifies three kinds of theories of jurisdiction, which he draws from American law but believes to be applicable

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99. 326 U.S. 310 (1945).

to any contemporary legal order:<sup>100</sup> relational theories, power theories, and fairness theories.<sup>101</sup> Relational theories focus on the relation of allegiance between a government and the individuals falling under its jurisdiction as a consequence of this relation.<sup>102</sup> Power theories see the court's power over the defendant as the basis of jurisdiction.<sup>103</sup> Fairness theories, ask whether it is fair, as between the parties, to submit the defendant to the jurisdiction of the court. Lea Brilmayer, using slightly different terminology, identifies sovereignty theories, convenience theories, and power theories.<sup>104</sup> Her convenience theory is similar to what von Mehren calls a fairness theory; her sovereignty theory can be treated here as structurally similar to von Mehren's relational theory, and her sovereignty theory is very close to von Mehren's relational theory.

The power theory is famously encapsulated in Justice Holmes' assertion that "[t]he foundation of jurisdiction is physical power . . . ."<sup>105</sup> The basis of the theory is the relationship of domination and submission between the court and the defendant. In ancient England, this meant actual power. Jurisdiction was asserted over the defendant by physical arrest, to ensure his presence at the trial. Since then, the assertion of power has changed from actual to symbolic;<sup>106</sup> the public and actual assertion of power is now privatized<sup>107</sup> and symbolized in service of process by the plaintiff or her attorneys. Two decisions frequently explained with a power theory are *Pennoyer v. Neff*<sup>108</sup> and *Burnham v. Superior Court of California*.<sup>109</sup> *Pennoyer* established that service of process is *necessary* to give a court power and therefore jurisdiction; *Burnham* made clear that service of process is *sufficient* to give a court jurisdiction, because, at least for traditional bases of jurisdiction like service, nothing beyond power is necessary.

The second relevant set of theories are relational and sovereignty theories. Although von Mehren suggests that relational theories of juris-

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100. Arthur T. von Mehren, *Adjudicatory Jurisdiction: General Theories Compared and Evaluated*, 63 B.U. L. REV. 279, 281–82 (1983).

101. *Id.* at 283–4; von Mehren, *supra* note 10, at 31–36.

102. von Mehren, *supra* note 100, at 283.

103. *Id.* at 283, 285–87.

104. LEA BRILMAYER, *CONFLICT OF LAWS* 268–75 (2d ed. 1995).

105. *McDonald v. Mabee*, 243 U.S. 90, 91 (1917).

106. *Cf.* Evan Tsen Lee, *The Dubious Concept of Jurisdiction*, 54 HASTINGS L.J. 1613, 1615–1620 (2003) (arguing that when we talk of power we really mean legitimate authority).

107. *Cf.* Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 705–14 (1987) (discussing how due process shifted in emphasis from public sovereign to private individual concerns).

108. 95 U.S. 714 (1877).

109. 495 U.S. 604 (1990).

diction no longer exist in the real world,<sup>110</sup> it is nevertheless fruitful to scrutinize such theories with an eye to discerning their paradigmatic framework. A relational theory gives jurisdiction to the courts of a sovereign if and because the defendant owes the sovereign allegiance. The clearest example can be found in feudal relations, where the lord's jurisdiction over his fee-holders is based on the feudal relation between the two. Relational arguments still may explain some contemporary jurisdictional discourse in the United States. For example, although "doing business" jurisdiction was historically based on the fiction of a corporation's presence in a certain territory, the fact that it requires voluntary conduct fits well with a fiction of consent. Jurisdiction is then based on the relationship established through the defendant's consent. Lea Brilmayer's sovereignty theory of jurisdiction, in which jurisdiction as the enforcement of sovereignty must be justified by some act of submission to the sovereign, comes close to a relational theory of jurisdiction; the necessary relation is no longer a feudal one but one of legitimate sovereignty.<sup>111</sup>

The third kind of theory of jurisdiction is the fairness or convenience theory. Much of the U.S. Supreme Court case law in the twentieth century, starting with *International Shoe*,<sup>112</sup> has been explained with such a theory. The main focus of this kind of theory is not the power of the court over the defendant, but rather whether it would be inconvenient for her to defend herself in a forum she did not choose. The U.S. Supreme Court formulated a two-prong test in *International Shoe*, relying on minimum contacts and substantial fairness to the defendant; a third requirement of reasonableness was added later.<sup>113</sup> Fairness theories focus on the relationship between the litigants and the forum, as well as that between the underlying controversy and the forum,<sup>114</sup> but unlike relational theories, the question is one of fairness regardless of sovereignty considerations.

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110. von Mehren, *supra* note 100, at 283; *but see* von Mehren, *supra* note 10, at 186–88 (discussing how Articles 14 and 15 of the French *Code Civil* can be explained with a relational theory). Some authors have disputed the difference between allegiance and power theories; *see* Paul Lagarde, *Le Principe de Proximité dans le Droit International Privé Contemporain*, 196 RECUEIL DES COURS 9, 129 (1986); THOMAS PFEIFFER, INTERNATIONALE ZUSTÄNDIGKEIT UND PROZESSUALE GERECHTIGKEIT: DIE INTERNATIONALE ZUSTÄNDIGKEIT IM ZIVILPROZESS ZWISCHEN EFFEKTIVEM RECHTSSCHUTZ UND NATIONALER ZUSTÄNDIGKEITSPOLITIK 202 n.11 (1995). However, one important difference is that relation, unlike power, contains a voluntary element.

111. BRILMAYER, *supra* note 104, at 269–70.

112. *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

113. *See Asahi Metal Indus. Co. Ltd. v. Super. Ct. of Cal.*, 480 U.S. 102, 114 (1987); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477–78 (1985). *See also Burbank*, *supra* note 14, at 747.

114. von Mehren, *supra* note 10, at 288–90.

It is necessary neither to decide which of these theories is normatively or descriptively the most attractive, nor to add to the numerous analyses of the U.S. Supreme Court's oscillation in the twentieth century between a power and a fairness theory. Michael Solimine has plausibly argued that the shifts in the Supreme Court's jurisprudence had limited impact on actual decisions in lower courts.<sup>115</sup> This supports the intuition that the differences between the theories, though certainly real and considerable, are not paradigmatic; all theories exist within the same paradigm.

## 2. A Vertical, Unilateral, Domestic, Political Paradigm

First, the focus of all these theories is *vertical*.<sup>116</sup> Nearly all attention goes to the vertical relation between the court and the defendant. The power theory focuses on the power relation between court and defendant, both in its actual and its hypothetical form. Whether power is real, as in old English law, or symbolic, as in modern U.S. law, matters little in this regard. The relational theory and the sovereignty theory are different only insofar as they focus on the underlying legitimizing basis for the assertion or jurisdiction rather than on sheer power. They are similar, however, in that they also focus on the vertical relation between the court and the parties; they both ask whether the assertion of jurisdiction by the court is legitimate vis-à-vis the parties. The same is true for the convenience theory.

Fairness theories may not appear vertical at first sight, since they seem to emphasize fairness in the horizontal relation between the parties over the vertical relation between the court and the defendant. But in their application, the real focus is again on the relation between the court and the defendant and whether it is fair for the court, in this relation, to assert jurisdiction over the defendant. A horizontal fairness theory focusing rigorously on the relations between the parties would have to consider the plaintiff's interests in litigating at the place of his choice and weigh these interests against those of the defendant. Yet the fairness theory, as applied by U.S. courts, rarely takes these competing interests of plaintiffs into account.<sup>117</sup> The decision in *Keeton v. Hustler*<sup>118</sup> provides an example: although the plaintiff had no connection to the forum and

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115. Michael E. Solimine, *The Quiet Revolution in Personal Jurisdiction*, 73 TUL. L. REV. 1 (1998).

116. See Lea Brilmayer, *Jurisdictional Due Process and Political Theory*, 26 U. FLA. L. REV. 293, 295-99 (1987).

117. See Lea Brilmayer, *How Contacts Count: Due Process Limits on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 111 (1980); BRILMAYER, *supra* note 104, at 273; von Mehren, *supra* note 10, at 191; see also *infra*, Parts IV.A, IV.B.

118. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 770 (1984).

had obviously engaged in forum shopping, the Court considered it sufficient for jurisdiction that the defendant had minimum contacts, even though those were relatively insignificant as well. This obliviousness to the relative interests of plaintiffs and defendants is easy to explain if the fairness theory is conceived as a vertical one in which only the relationship between the court and the parties matters, and the relationship between the parties is irrelevant.

Second, these theories are *unilateral*. They determine whether the courts of a state have jurisdiction or not, regardless of whether the courts of other states also have jurisdiction. For example, if the power theory “never succeeded in producing exclusive jurisdiction,”<sup>119</sup> this may be due to the fact that the exclusion of foreign jurisdiction was never its aim in the first place. In determining a state’s power over a defendant, it is irrelevant whether other states have similar power. Similarly, a relational test asks only whether a relationship between the court and the litigants in the dispute exists, not whether this is the only or the most important relation. A fairness test is also unilateral. At stake is whether it is fair for a state to assert jurisdiction over the defendant, not whether it is fairer for this state than for others to do so. Courts will ask whether it is inconvenient for the defendant to defend herself, not whether it is more inconvenient before this than before another forum. In fact, the fairness test would not make sense otherwise because it is almost always more convenient for a defendant to be sued in her home forum than elsewhere.

This unilateralism underlies even reformist literature. Paul Schiff Berman’s important article on the globalization of jurisdiction<sup>120</sup> convincingly discards many of the assumptions underlying current thinking about jurisdiction, especially that of territoriality. Berman’s own solution, however, remains squarely within a unilateral paradigm: each community decides about its own jurisdiction in isolation from the claims of others; “international” (or inter-community) considerations only appear at the recognition stage when these communities must try to convince other communities of their own jurisdiction.<sup>121</sup> Even where Berman argues that communities should exercise a “cosmopolitan” attitude and defer to the jurisdictional claims of others,<sup>122</sup> he does so on a

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119. Clermont, *supra* note 49, at 99–100.

120. Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311 (2002).

121. Paul Schiff Berman, *From International Law and Globalization*, 43 COLUM. J. TRANSNAT’L L. 485, 533–38 (2005) (distinguishing between jurisdiction and jurisprudence); see also Ralf Michaels, *The Re-Statement of Non-State Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism*, 53 WAYNE L. REV. 1199, 1212 (2006).

122. Paul Schiff Berman, *Towards a Cosmopolitan Vision of Conflict of Laws: Redefining Governmental Interests in a Global Era*, 153 U. PA. L. REV. 1819, 1834–39, 1868–71 (2005).

unilateral basis—he proposes a cosmopolitan community that transcends the various communities that might assert jurisdiction<sup>123</sup> and thereby turns all multilateral issues into internal issues.

Third, all theories can be labeled *domestic*. This means that jurisdiction is a local issue, determined by the limits that national (or state) law sets for its own courts. The question is whether the dispute brought to the court lies within, or outside of, the state's boundaries, inside or outside the state's legal order. Unlike in an international paradigm, in a domestic paradigm it is largely irrelevant whether the courts of other states would more appropriately exercise jurisdiction. Matters of jurisdiction are domestic matters; foreign national interests are relevant only insofar as they can be translated into such domestic matters.

All three types of jurisdictional theories can be shown to remain within a domestic paradigm. The power theory and the relational/sovereignty theory are obviously most compatible with a domestic paradigm; they ask whether the defendant or the dispute is within the sovereign power of the court exercising jurisdiction. Though less obvious, the same is true for a fairness theory. Fairness, as a requirement of jurisdiction, is fairness to the defendant, not fairness to other countries and their competing claims to jurisdiction.

Again, this domestic paradigm can be discovered not only in case law, but also in reformist literature, which does not transcend the paradigm. Berman's main test for the adequacy of asserting jurisdiction—whether a defendant is “a member” of the community that asserts jurisdiction<sup>124</sup>—provides one example. Another example is Evan Tsen Lee's recent proposal to view jurisdictional questions as similar to questions on the merits, because both are about the legitimacy of a resulting judgment.<sup>125</sup> Since questions on the merits are undoubtedly domestic matters (provided domestic law applies), this proposal makes sense only if jurisdiction is likewise understood as domestic<sup>126</sup> and the legitimacy question underlying jurisdiction concerns the relation to domestic society rather than to foreign courts.<sup>127</sup>

Fourth, U.S. jurisdictional theories are *political*. Jurisdiction in the United States, since it focuses on the relationship between the parties and the court, is a political issue. Since the exercise of jurisdiction is

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123. *Id.* at 486.

124. Berman, *supra* note 120, at 487–88.

125. Lee, *supra* note 106, at 1620. Lee's point that even the power theory is really about legitimacy can be found earlier, e.g. BRILMAYER, *supra* note 104, at 296.

126. Lee, *supra* note 106, at 1629.

127. *Id.* at 1625–27. Lee considers the possibility that legitimacy of jurisdiction and legitimacy of merits are conceptually different, but all the conceptual differences he considers—pedigree versus content—remain domestic.

viewed along a vertical dimension as a public intrusion into the defendant's freedom, the individual has a negative right to be free from state intervention unless this intervention is justified. This is why justification for jurisdiction often occurs with reference to political philosophers dealing with the justification for governmental authority, be they Hobbes and Locke<sup>128</sup> or Rawls, Hart, and Nozick.<sup>129</sup> Since these philosophers' theories all focus on the vertical relation between government and citizens, they translate well into jurisdiction; the court represents the government and the defendant represents the governed.<sup>130</sup> What the theories do not address are relations to other states. For example, a Lockean fairness theory of jurisdiction can explain jurisdiction over non-citizens, but it has little space for horizontal relations with other states' courts.<sup>131</sup> For Locke, the assertion of jurisdiction over foreigners was based on the foreigner's implied submission, not on any comity granted by the foreigner's home state. In this sense, the political justification remains domestic. The reason may be that, in matters of private litigation, the respective interests of states in exercising jurisdiction are minimal;<sup>132</sup> what matters politically is the power exercised over the parties.

### 3. Subsumption and Externalization of Competing Considerations

Of course, this is not the whole picture. No one can seriously say that U.S. law focuses only on the relations between the court and the defendant or the dispute and not at all on the relations to other states. Relations to other states are considered within the due process test for jurisdiction and they are considered through several other legal mechanisms. However, these exceptions strengthen rather than weaken the thesis that U.S. jurisdictional law remains in a vertical, unilateral, domestic, political paradigm. When multilateral considerations become relevant within the due process test, they are subsumed within the domestic paradigm that the Due Process Clause encompasses. Further, because the multilateral function of allocation between different states is

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128. See Roger H. Transgrud, *The Federal Common Law of Personal Jurisdiction*, 57 GEO. WASH. L. REV. 849, 892–93 (1989); Richard B. Cappalli, *Locke as the Key: A Unifying and Coherent Theory of In Personam Jurisdiction*, 43 CASE W. RES. L. REV. 97, 101 (1992); Brilmayer, *supra* note 116, at 276, 301, 306; von Mehren, *supra* note 10, at 31–33.

129. Brilmayer, *supra* note 116, at 305, 307.

130. Cappalli, *supra* note 128, at 101.

131. von Mehren, *supra* note 10, at 35; Cf. JOHN LOCKE, TWO TREATISES OF GOVERNMENT II §§ 119–22 (Peter Laslett ed., Cambridge University Press 1988) (1689) (justifying jurisdiction over non-citizens with the non-citizens' tacit consent).

132. Martin H. Redish, *Due Process, Federalism and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112, 1132 (1981).

externalized—fulfilled by other, functionally equivalent, institutions—the law of jurisdiction can remain largely oblivious to these considerations.

First, the Due Process Clause is also used for multilateral considerations, especially for interstate cases in the context of federalism. The reasonableness prong of the due process test emphasizes “the interstate judicial system’s interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.”<sup>133</sup> The U.S. Supreme Court appeared to think multilaterally when it pointed out, in *World-Wide Volkswagen*, that “[t]he sovereignty of each State, in turn, implied a limitation on the sovereignty of all of its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment.”<sup>134</sup> The passage is frequently invoked in support of an allocational theory of jurisdiction.

These considerations cannot be explained through reference to the relationship between the court and the defendant, and have therefore been criticized as irrelevant for the Due Process Clause.<sup>135</sup> They represent the horizontal relation between states.<sup>136</sup> However, it is by no means irrelevant that the locus of these limitations is not the “scheme” of the Constitution but ultimately “the Due Process Clause, acting as an instrument of interstate federalism, which may sometimes act to divest the State of its power to render a valid judgment.”<sup>137</sup> Multilateral effects of allocation of jurisdiction are not prime goals but mere reflective consequences of unilateral considerations. They are subsumed: “[t]he restriction on state sovereign power described in *World-Wide Volkswagen Corp.*, however, must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause;”<sup>138</sup> “[d]ue process protects the sovereign interests of other states, but only incidentally.”<sup>139</sup> Federalism is used as an argument that some restrictions on jurisdiction

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133. *Asahi Metal Indus. Co. Ltd. v. Super. Ct. of Cal.*, 480 U.S. 102, 113 (1987); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985); *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 292 (1980).

134. 444 U.S. at 293.

135. See Redish, *supra* note 132; Harold S. Lewis, Jr., *The Three Deaths of “State Sovereignty” and the Curse of Abstraction in the Jurisprudence of Personal Jurisdiction*, 58 NOTRE DAME L. REV. 699, 739–40 (1983).

136. Weinstein, *supra* note 78, at 228.

137. *Id.* at 294.

138. *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982).

139. Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 711 (1987); cf. BRILMAYER, *supra* note 104, at 271 (“In personal jurisdiction, it is the *individual’s* right to be left alone by a state that has no legitimate authority over him or her that the due process clause protects.”).



are necessary in a federal system, but the source for these restrictions is the Due Process Clause.

It is of course true that multilateral considerations of federalism were crucial for early American law on jurisdiction. But they were so in a very peculiar way: in many of the old leading cases, for example *D'Arcy v. Ketchum*,<sup>140</sup> jurisdiction became relevant only indirectly, as a requirement for enforcement under the Full Faith and Credit Clause.<sup>141</sup> At stake was not whether the assertion of jurisdiction itself by those courts violated the Constitution, but rather whether a state had to give full faith and credit to decisions rendered by the courts of another state without jurisdiction. Restraints on jurisdiction were therefore only indirect.<sup>142</sup> The same is true for specific restrictions of jurisdiction in individual areas of the law—such as divorce, property, or penal law.<sup>143</sup> Restrictions on direct jurisdiction, by contrast, are not based on the Full Faith and Credit Clause, where they would belong if they were primarily about multilateral, allocational issues.<sup>144</sup> Rather, they are based on the unilateral Due Process Clause, where federalism issues become relevant only implicitly.

That the “scheme” of the Constitution does not provide a proper source for explicit multilateral considerations becomes even clearer in view of case law on international cases. The U.S. Supreme Court uses almost exactly the same approach for international cases that it has developed for domestic interstate cases, although constitutional limitations derived from federalism should be irrelevant where a potential conflict

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140. 52 U.S. 165 (1850).

141. See Ralph U. Whitten, *The Constitutional Limitations on State Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses (Part One)*, 14 CREIGHTON L. REV. 499 (1981).

142. SCOLES ET AL., *supra* note 9. On the difference between direct and indirect jurisdiction, see Arthur Nussbaum, *Jurisdiction and Foreign Judgments*, 41 COLUM. L. REV. 221 (1941); Arthur T. von Mehren & Donald T. Trautman, *Recognition and Enforcement of Foreign Adjudications: A Survey and a Suggested Approach*, 81 HARV. L. REV. 1601, 1610–36 (1968); Arthur T. von Mehren, *Recognition and Enforcement of Foreign Judgments—General Theory and the Role of Jurisdictional Requirements*, in 167 RECUEIL DES COURS 9 (1980); Ralf Michaels, *Some Jurisdictional Conceptions as Applied in Judgments Conventions*, in CONFLICT OF LAWS IN A GLOBALIZING WORLD, *supra* note 46, part II.1, available at <http://ssrn.com/abstract=927484>.

143. Cf. Weinstein, *supra* note 78, at 225–26, 227 (finding a distinction between jurisdiction at the decision stage and at the recognition stage “inimical to a rational system of interstate justice”). Such a distinction, although not always well recognized in the interstate context, is crucial especially in the international context, in which different countries’ approaches to jurisdiction may differ widely. See Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1126–27 (1966). See Weinstein, *supra*, note 78, at 258–64.

144. Robert Abrams & Paul Dimond, *Toward a Constitutional Framework for the Control of State Court Jurisdiction*, 69 MINN. L. REV. 75 (1984); Transgrud, *supra* note 128, at 880–84 (1989).

of jurisdictions is with another country. Nonetheless, proposals to abolish or at least seriously restrict constitutional control of jurisdiction in international settings<sup>145</sup> have remained unheeded. The only possible conclusion is that the constitutional setting of allocation cannot be what drives constitutional restrictions on jurisdiction.

Critics argue that the need to explain restrictions to jurisdiction with reference to the protection of individual rights hampers the development of principles addressing more specifically the concerns of federalism and of interstate and international allocation of jurisdiction.<sup>146</sup> They ask the courts to base allocational federalist concerns in jurisdiction on other foundations, either the general structure of the Constitution, federal common law,<sup>147</sup> or more detailed rules of state law.<sup>148</sup> Such changes in the law of jurisdiction are less urgent once it becomes clear that these considerations are already taken care of, albeit in different ways—they are externalized from the law of *in personam* jurisdiction to other areas of the law. Through externalization, the U.S. legal system can simultaneously account for the necessities of multilateralism and yet keep the law of jurisdiction free of them so its jurisdictional paradigm remains internally consistent.

One kind of externalization takes place through the doctrine of *forum non conveniens*.<sup>149</sup> The private and public factors in the *forum non conveniens* test are so similar to those in the due process test that some have questioned the necessity of two separate tests.<sup>150</sup> But *forum non conveniens* differs from due process in one important respect: it requires a comparison of the relative convenience of several available fora.<sup>151</sup> A

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145. Andrew L. Strauss, *Where America Ends and the International Order Begins: Interpreting the Jurisdictional Reach of the U.S. Constitution in Light of a Proposed Hague Convention on Jurisdiction and Satisfaction of Judgments*, 61 ALB. L. REV. 1237 (1998); Wendy Perdue, *Aliens, the Internet, and "Purposeful Availment": A Reassessment of Fifth Amendment Limits on Personal Jurisdiction*, 98 NW. U. L. REV. 455 (2004); see also Austen L. Parrish, *Sovereignty, not Due Process: Personal Jurisdiction over Nonresident Alien Defendants*, 41 WAKE FOREST L. REV. 1, 56–59 (2006) (suggesting abolishing constitutional constraints on personal jurisdiction over aliens and replacing them with constraints from comity).

146. Weinstein, *supra* note 78, at 270–76.

147. See generally Weinstein, *supra* note 78; Whitten, *supra* note 141.

148. Clermont, *supra* note 49, at 110–12.

149. Under this doctrine, a court can decide not to exercise jurisdiction if it finds itself to be an inappropriate forum and if there is a clearly more appropriate forum elsewhere.

150. Allan R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781 (1985); Margaret G. Stewart, *Forum Non Conveniens: A Doctrine in Search of a Role*, 74 CAL. L. REV. 1259 (1987); KEVIN M. CLERMONT, TERRITORIAL JURISDICTION AND VENUE 43 (1999); see also CHASE, LAW, CULTURE, AND RITUAL, *supra* note 52, at 80.

151. SCOLES ET AL., *supra* note 9, at 493–94. Given how insufficient the analysis of an alternative forum often is, and how rarely suits are brought again at an alternative forum after a *forum non conveniens* dismissal, one could argue that not even *forum non conveniens* in U.S.

court will declare itself a *forum non conveniens* only if another forum is both available and clearly more appropriate. Functionally, the doctrine of *forum non conveniens* can be viewed as a jurisdictional device; to determine whether a court should hear a case or not is at its heart a decision about jurisdiction and its exercise. It is therefore significant that, doctrinally, *forum non conveniens* is a matter different from jurisdiction.<sup>152</sup> Dismissal on the basis of *forum non conveniens* is available only if a court otherwise has jurisdiction;<sup>153</sup> it is a matter of discretion and does not create *res judicata*. By externalizing multilateral considerations to a doctrine outside of jurisdiction, the U.S. law of jurisdiction can maintain its unilateral posture.<sup>154</sup> Whether the alternative forum provides a real alternative for the plaintiff is not an issue American courts address in detail, and few cases dismissed with regard to another forum are later brought at that forum.<sup>155</sup> But this only suggests that the foreign forum is less attractive than the one where the suit was first brought; it does not suggest that multilateral considerations are not taken seriously.<sup>156</sup>

A second externalization of multilateral consideration takes place through the foreign affairs power. In *Asahi Metal v. Superior Court of California*, the Supreme Court invoked “the federal interest in Government’s foreign relations policies” as a relevant consideration when asking whether exercising jurisdiction would be reasonable.<sup>157</sup> International concerns are therefore present in the analysis. At the same time, however, deference in multilateral issues to the executive branch ensures that the Court remains in a domestic, not international, paradigm. The issue is addressed not as one of allocation of power between one country

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law is not a truly multilateral doctrine. In an unpublished empirical study, Christopher A. Whytock finds that in his sample of cases since 1990, in an estimated forty-one percent of *forum non conveniens* cases, including eighteen percent of *forum non conveniens* dismissals, the court engaged in no adequate alternative forum analysis. However, the fact that courts do not perform their multilateral tasks well has no impact on the fact that this task is multilateral.

152. For English law, see Fentiman, *supra* note 25, at 86.

153. This proposition is accurate, at least according to *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 504 (1947). The U.S. Supreme Court will review this question in *Sinochem Int’l Co. Ltd. v. Malaysia Int’l Shipping Corp.*, No. 06-102.

154. By dismissing a case on condition or stipulation, a court can try to guarantee that the more appropriate forum will hear the case and thereby reach an effect very similar to that of transfer. In the majority of cases, however, an action dismissed by one forum under the doctrine of *forum non conveniens* is not brought again before another court. For empirical data, see D. Robertson, *Forum Non Conveniens in America and England: “A Rather Fantastic Fiction”*, 103 L.Q. REV. 398, 419 (1987).

155. Burbank, *supra* note 24, at 242–43; Martin Davies, *Time to Change the Federal Forum Non Conveniens Analysis*, 77 TUL. L. REV. 309, 346–48 (2002).

156. See Russell W. Weintraub, *Response to Professor Robertson*, 29 TEX. INT’L L.J. 381, 381 (1994); see also *supra* note 154.

157. 480 U.S. 102, 115 (1987).

and another (as it would be in an international paradigm), but rather as one of allocation of power between the judiciary and the executive. International considerations are for the government; domestic considerations remain with the courts.

Finally, a third important externalization involves the law of recognition and enforcement of foreign decisions. In the interstate system, horizontal considerations can be ignored at the stage of jurisdiction because they become relevant at the stage of recognition. It is significant in this regard that, apart from fraud, lack of jurisdiction in the rendering court is the only relevant exception to the constitutional requirement to give full faith and credit to other states' judgments.<sup>158</sup> Likewise, in the international realm, foreign nation judgments are denied recognition for lack of jurisdiction of the rendering court, which includes not only jurisdiction under that court's own law, but also (and more importantly for purposes of this Article) lack of jurisdiction under U.S. due process standards.<sup>159</sup> In fact, the requirements for recognition purposes can be even stricter than those proposed for jurisdiction of U.S. courts.<sup>160</sup> Although this is an imperfect substitute for restricting jurisdiction at the time of the first decision (because a non-recognizable decision remains enforceable in the country where it was rendered), for a unilateral paradigm it has the advantage that multilateral considerations come into play at the moment when the judgment's effects become multilateral, because the judgment is taken into another state for recognition purposes. Considering multilateral issues of jurisdiction at the recognition stage makes it easier to neglect multilateral considerations at the decision stage.

#### B. "Us or Them"—The European Paradigm of Jurisdiction

European thinking about jurisdiction is strikingly different. This can be said as a general statement, even though European countries have dif-

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158. See discussion in SCOLES ET AL., *supra* note 9, at 1284–88. Cf. WEINTRAUB, *supra* note 14, at 123 ("The defendant can make this attack [of lack of jurisdiction] either in the state in which the judgment has been rendered or in a sister state."); see *id.* at 123–24 for the different situation under EU law, where a collateral effect is not possible.

159. See the references in GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 969–71 (3d ed. 1996); *Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute—Proposed Final Draft* § 6, at 14 (April 11, 2005) [hereinafter ALI JUDGMENTS STATUTE]. For analysis, see Michaels, *supra* note 142; CONFLICT OF LAWS IN A GLOBALIZING WORLD: A TRIBUTE TO ARTHUR VON MEHREN, (Eckart Gottschalk, Ralf Michaels, Giesela Rühl & Jan von Hein eds., forthcoming 2007).

160. See ALI JUDGMENTS STATUTE, *supra* note 159, at 85, 87.

ferent laws of jurisdiction.<sup>161</sup> European legislation, notably the Brussels Regulation, brought a unified law of jurisdiction within Europe and a somewhat unified theory, but only to a limited degree. Nonetheless, the Brussels Regulation can be considered representative of European law for two reasons. First, it incorporates and therefore represents much jurisdictional thinking from the member states. Second, in its focus on relations between member states, rather than relations to third countries, it is most comparable to U.S. law, which developed largely in an interstate setting. Of course, national laws on jurisdiction remain important, as inspiration for the Brussels Regime and as representations of European thinking.

### 1. European Thinking About Jurisdiction

Any comparison of American and European thinking about jurisdiction faces an immediate problem: European jurisdictional thinking was for a long time less theoretical than American thinking.<sup>162</sup> One could therefore attempt simply to use the triad of theories developed in the American context, relational/sovereignty, power, and interest theories, on European law as well. To some extent, relational theories can be used to explain jurisdiction based on domicile and habitual residence, as in Article 2 of the Brussels Regulation, and jurisdiction based on nationality, as in Articles 14 and 15 of the French *Code Civil*, which give jurisdiction to French courts based on the French nationality of the plaintiff or the defendant.<sup>163</sup> Power and sovereignty theories seem even more appropriate to explain these French bases: jurisdiction is based on the sovereign power of the French nation-state over its citizens.<sup>164</sup> Power has also been used to explain Article 23 of the German Code of Civil Procedure, which gives courts general jurisdiction based on the presence of assets of the defendant.<sup>165</sup> Fairness and convenience theories can go a long way

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161. English law, with its common law tradition, differs fundamentally from continental law; in many (though not all) regards, it is closer to the U.S. paradigm than the European paradigm.

162. For the German approach, see von Mehren, *supra* note 10, at 143. This relative lack of theoretical accounts is in accordance with the apolitical character this Article claims for the European paradigm; *infra* Part III.B.2. Where the assertion of jurisdiction is largely viewed as a neutral and technical matter, theories for its justification are unnecessary.

163. For such an explanation, see *id.* at 186–88; for an analysis of Article 14 of the *Code Civil* from a U.S. perspective, see Clermont & Palmer, *supra* note 20; for a pertinent decision affecting a U.S. party, see Cass. Civ., Mar. 30, 2004, *supra* note 67 (rejecting enforcement of a U.S. judgment against a French woman who had not waived her privilege under *Code Civil* Article 14 to be sued only in France).

164. ÉTIENNE PATAUT, *PRINCIPE DE SOUVERAINETÉ ET CONFLITS DE JURISDICTIONS (ÉTUDE DE DROIT INTERNATIONAL PRIVÉ)* 95 (1999).

165. RUDOLF WAIZENEGGER, *DER GERICHTSSTAND DES § 23 ZPO UND SEINE GESETZLICHE ENTWICKLUNG* 100–01 (1915); PFEIFFER, *supra*, note 110, at 204; *but cf.* von Mehren,

towards explaining many bases of specific jurisdiction. Especially in Germany, there has long been a focus on private interests as factors in designating competent fora;<sup>166</sup> scholars and courts also emphasize private interests at work in the Brussels Regulation.<sup>167</sup>

Yet, Europeans rarely use these American theories,<sup>168</sup> and indeed they do not accurately explain European law. First, there is a difference in emphasis. American comparatists, applying the theories to European jurisdictional law, often focus on provisions that may look central through the lens of the theories but appear peripheral to European analysts and practice. For example, although Article 23 of the German Code of Procedure is a regular focus of American analysis (and outrage), the provision plays a relatively modest role in German jurisdictional practice;<sup>169</sup> the same is true for Articles 14 and 15 of the French *Code Civil*.<sup>170</sup> Second, none of the theories can adequately explain current European law. In particular, the principle that plaintiffs normally seek out defendants, which is central to European jurisdictional thinking<sup>171</sup> and codified in Article 2 of the Brussels Regulation, cannot be explained by any of these theories, as von Mehren has shown.<sup>172</sup> Relational theories could focus on plaintiffs or defendants equally well, as the French *Code Civil* makes clear: Article 14 gives jurisdiction to French plaintiffs, and Article

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*supra* note 10, at 145 n.377 (“Section 23 is less consistent than its pre-1871 precursors with a power theory.”).

166. See ANDREAS HELDRICH, INTERNATIONALE ZUSTÄNDIGKEIT UND ANWENDBARES RECHT 102–31 (1969); JOCHEN SCHRÖDER, INTERNATIONALE ZUSTÄNDIGKEIT: ENTWURF EINES SYSTEMS VON ZUSTÄNDIGKEITSINTERESSEN IM ZWISCHENSTAATLICHEN PRIVATVERFAHRENSRECHT AUFGRUND RECHTSHISTORISCHER, RECHTSVERGLEICHENDER UND RECHTSPOLITISCHER BETRACHTUNGEN 112–485 (1971) (extensive comparative and historical analysis); HAIMO SCHACK, INTERNATIONALES ZIVILVERFAHRENSRECHT: EIN STUDIENBUCH 93–94, nos. 200–04 (3d ed. 2002).

167. *Infra* Parts IV.A, IV.D.

168. Exceptions are usually influenced by U.S. law. See, e.g., PFEIFFER, *supra* note 110, at 200–13; TILL U. KLEINSTÜCK, DUE PROCESS-BESCHRÄNKUNGEN DES VERMÖGENS-GERICHTSSTANDES DURCH HINREICHENDEN INLANDSBEZUG UND MINIMUM CONTACTS 166–88 (1994).

169. *Contra* PFEIFFER, *supra* note 110, at 8 (“Since the legislator created this provision with a view to cases with international focus, it is of exemplary relevance for the whole law of jurisdiction.”) (Ralf Michaels trans.). The opposite seems more plausible: since the provision was conceived as an exception to the analogous application of venue provisions for matters of jurisdiction, Article 23 cannot be considered representative. Moreover, Pfeiffer’s own conclusion that Article 23 violates the German Constitution, *id.* at 620–23, reinforces its exceptional character.

170. See Clermont & Palmer, *supra* note 20, at 492 (“In fact, Article 14 appears not to be regularly invoked in practice.”).

171. *Supra* note 87.

172. von Mehren, *supra* note 10, at 185–91; Arthur T. von Mehren, *Must Plaintiffs Seek Out Defendants? The Contemporary Standing of Actor Sequitur Forum Rei*, 8 KING’S COLL. L.J. 23 (1997–98); see also BENEDIKT BUCHNER, KLÄGER- UND BEKLAGTENSCHUTZ IM RECHT DER INTERNATIONALEN ZUSTÄNDIGKEIT *passim* (1998).

15 gives jurisdiction over French defendants. Each provision rests on relational considerations; there is no intrinsic reason why a relational theory should focus only on defendants.<sup>173</sup> Similarly, power theories do not systematically favor defendants' fora; they can justify the existence of a number of different courts with jurisdiction.<sup>174</sup> Fairness theories, finally, cannot explain why defendants should be preferred over plaintiffs.<sup>175</sup> That none of these theories can explain a central element of European jurisdictional thinking suggests that they are inadequate. Moreover, given that these theories furnish all the reasonable answers that have been advanced in response to the fundamental question of jurisdiction as understood in the United States—when is it appropriate vis-à-vis the defendant for a court to exercise jurisdiction over him—it is plausible that the questions to which European law responds differ altogether from those posed in the United States.

Europeans do indeed ask different questions. To understand how different, it is instructive to look at the roots of German jurisdictional law as one important source of European jurisdictional thinking.<sup>176</sup> In Germany, the law of jurisdiction—*internationale Zuständigkeit* (international competence)—was derived from the law of venue—*örtliche Zuständigkeit* (local competence).<sup>177</sup> For a long time, the highest German court, the *Reichsgericht*, did not even distinguish between these forms of competence, but rather treated them both as issues of venue.<sup>178</sup> A differentiation between international jurisdiction and venue developed only slowly; still today most rules on international jurisdiction are derived from the rules on venue. Significantly, the author of one of the official reports on the Brussels Convention speaks of “international venue”—because calling them provisions of jurisdiction would falsely suggest similarity to American ideas of jurisdiction—and points out that

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173. von Mehren, *supra* note 10, at 188.

174. *See id.* at 189; *see also* Schlosser, *supra* note 17, at 19 (“Justice Holmes’ ‘power concept’ as the basis of jurisdiction is alien to civil-law systems.”) (internal reference omitted).

175. *See* von Mehren, *supra* note 10, at 191 (citing *Int’l Shoe v. Washington*, 326 U.S. 310 (1945)). Note that this Article, in focusing on paradigms, is concerned with jurisdictional thinking rather than practical results; *supra* Part C.1. Whether in practice most suits must be brought at the defendant’s forum is a different question; for this question, *see* von Mehren, *supra* note 10, at 191–94.

176. French law, which once focused more on sovereignty concerns, has moved closer to this German model as well. *See* HUBERT BAUER, *COMPÉTENCE JUDICIAIRE INTERNATIONALE DES TRIBUNAUX CIVILS FRANÇAIS ET ALLEMANDS passim* (1965).

177. *See* PFEIFFER, *supra* note 110, at 73–77; PETER L. MURRAY & ROLF STÜRNER, *GERMAN CIVIL JUSTICE* (2004).

178. *E.g.* 8 OTTO WARNEYER, *DIE RECHTSPRECHUNG DES REICHSGERICHTS*, No. 247, at 376–77 (1915) (“There is no intrinsic reason to distinguish between the case in which the venue of a foreign court besides that of a German court is at stake and the case in which the choice must be struck between German courts.”) (Ralf Michaels trans.).

Europeans do not typically distinguish between jurisdiction and international venue.<sup>179</sup> As a consequence, considerations on jurisdiction are largely similar to those for venue. In fact, although Americans have also suggested such a similarity, a comparison with American proposals to merge jurisdiction and venue reveals the degree of difference between jurisdiction in Germany and jurisdiction in the United States: while some Americans are willing to treat venue like jurisdiction,<sup>180</sup> Europeans would rather treat jurisdiction like venue. Jurisdiction in the American sense has an altogether different doctrinal counterpart in German law, *Gerichtsbarkeit*. *Gerichtsbarkeit*, the origin of which is in international rather than national law, defines the outer limits of the power of one country's courts and is separate from international venue.<sup>181</sup> *Gerichtsbarkeit* concerns mainly questions of immunity, and its practical importance beyond this is not nearly as great as that of jurisdiction in the United States.<sup>182</sup>

This foundation of jurisdiction in venue is overlooked by American (and German) comparatists who consider only those provisions in German law most amenable to their own paradigm. For example, Article 23 of the German Code of Civil Procedure (*quasi in rem* jurisdiction) stands out because it deals explicitly with international cases, but its role within German law of jurisdiction is by no means prominent.<sup>183</sup>

The Brussels Regulation, not surprisingly, continues in many ways the approaches found in the jurisdictional systems of the EU member states.<sup>184</sup> In this way, it can be called a civil law instrument,<sup>185</sup> although here, as in other areas of the law, the distinction between civil law and common law is too abstract to be very helpful.<sup>186</sup> Significantly, in the

179. Schlosser, *supra* note 17, at 19–20. See Nussbaum, *supra* note 142, at 221–22.

180. Spencer Weber Waller, *A Unified Theory of Transnational Procedure*, 26 CORNELL INT'L L.J. 101 (1993); see also Clermont, *supra* note 14, at 27–29.

181. See, e.g., SCHACK, *supra* note 166, at 64–80; the foundational article is Max Pagenstecher, *Gerichtsbarkeit und interationale Zuständigkeit als selbständige Prozeßvoraussetzungen*, 11 RABELSZ 337 (1937). See also ROBERT NEUNER, INTERNATIONALE ZUSTÄNDIGKEIT (1929).

182. But see Bundesverfassungsgericht (BVerfG) (federal constitutional court) Feb 16, 2006, 2 BvR 1476/03, 59 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 2542 (2006) (denying enforcement for lack of *Gerichtsbarkeit* to a Greek judgment on reparation claims by Greek victims resulting from the German occupation of Crete in World War II); Markus Rau, *State Liability for Violations of International Humanitarian Law—The Distomo Case Before the German Federal Constitutional Court*, 7 GERMAN L.J. 701, 705–07 (2006).

183. Contra PFEIFFER, *supra* note 110, at 8.

184. See Schlosser, *supra* note 17, at 30.

185. Anna Gardella & Luca G. Radicati di Brozolo, *Civil Law, Common Law and Market Integration: The EC Approach to Conflicts of Jurisdiction*, 51 AM. J. COMP. L. 611, 612–16 (2003).

186. See David A.O. Edward, *The Role and Relevance of the Civil Law Tradition in the Work of the European Court of Justice*, in THE CIVILIAN TRADITION AND SCOTS LAW 309,



Regulation's predecessor, the 1968 Brussels Convention, the term "jurisdiction" was not used in any of the official languages;<sup>187</sup> it only appeared in the later English version when the United Kingdom joined in 1979. Indeed, the concept of jurisdiction in the Brussels Regulation is more similar to the German law of venue than to jurisdiction in the American sense.<sup>188</sup> Notably, most provisions of the Regulation simultaneously regulate venue within the member states<sup>189</sup>—as in Germany, venue and jurisdiction are not distinguished. On the other hand, jurisdiction in the sense of *Gerichtsbearbeitung* is left outside the scope of the Regulation altogether.<sup>190</sup>

The main objective of both German law and the Brussels Regulation is not to protect defendants but rather to allocate jurisdiction to the most appropriate member state, regardless of sovereignty interests of the member states. Defendants domiciled in a member state can always be sued in their home states (Article 2), and there are specific grounds for jurisdiction in Articles 5 *et seq.* Importantly, each of these specific provisions determines only one relevant factor and therefore renders only one state's courts competent. For example, specific jurisdiction for contracts could, in theory, lie at the place where the contract is made, the place where the contract is performed, or both. Yet, whereas under U.S. law this means that both places can in fact claim specific jurisdiction,<sup>191</sup> European law searches for one and only one connecting factor for each legal category; in the case of contracts, this is the place of performance (Article 5(1)).<sup>192</sup> The only exception is jurisdiction over torts, which lies

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311–15 (David L. Carey Miller & Reinhard Zimmermann eds., 1997) (denying a specific civil law influence on the European Court of Justice case law regarding the Brussels Convention).

187. The original text was passed in four official languages, none of which used the term jurisdiction or its foreign language equivalent: German (*Zuständigkeit*), French (*compétence judiciaire*), Italian (*competenza giurisdizionale*), and Dutch (*rechterlijke bevoegdheid*). The German president of the expert group that developed the Convention unsuccessfully proposed the term *Jurisdiktion*: Arthur Bülow, *Vereinheitlichtes Internationales Zivilprozessrecht in der Europäischen Wirtschaftsgemeinschaft*, 29 RABELSZ 473, 478 n. 15 (1965); see also REINHOLD GEIMER, *ZUR PRÜFUNG DER GERICHTSBARKEIT UND DER INTERNATIONALEN ZUSTÄNDIGKEIT BEI DER ANERKENNUNG AUSLÄNDISCHER URTEILE* 71 (1966).

188. Jan Kropholler, *Internationale Zuständigkeit*, in I HANDBUCH DES INTERNATIONALEN ZIVILVERFAHRENSRECHTS 197 (Tübingen, Mohr, 1982).

189. *Report on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*, 1979 O.J. (C 59) 5, 6 [hereinafter *Jenard Report*]; *Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and to the Protocol on its Interpretation by the Court of Justice*, 1979 O.J. (C 59) 71, para. 70 [hereinafter *Schlosser Report*].

190. JAN KROPHOLLER, *EUROPÄISCHES ZIVILPROZESSRECHT*, art. 2, no. 4, at 95 (8th ed. 2005).

191. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 479 (1985); *SCOLES ET AL.*, *supra* note 9, at 389 ("no single factor can be dispositive").

192. See Case C-256/00, *Besix v. WABAG*, 2002 E.C.R. I-1699, paras. 29, 32.

both at the place of conduct and at the place of injury,<sup>193</sup> but this is a matter of interpretation of “place of the tort,” not an endorsement of alternative factors.

In contrast to U.S. law, the Brussels Regulation distinguishes between intra-Community cases and cases involving contacts with non-member states. Its provisions apply to plaintiffs from non-member states<sup>194</sup> but not normally to defendants from non-member states;<sup>195</sup> against the latter, national provisions on jurisdiction remain applicable. Given how important this restriction is, and how heavily it has been criticized in the United States,<sup>196</sup> it is surprising to see how little thought was apparently given to it when the Convention was drafted.<sup>197</sup> The original reason for the restriction lay in the limited competence of the EU at the time;<sup>198</sup> now that this argument has lost some of its force, contemporary scholars are widely critical of the restriction.<sup>199</sup> The main justification given today is the pressure the restriction places on foreign countries like the United States to compromise on their own wide claims to jurisdiction or ensure enforcement of European decisions.<sup>200</sup> That Europeans consider the Regulation a good model for a worldwide con-

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193. Case 21/76, *Handelskwekerij G.J. Bier BV v. Mines de Potasse d'Alsace SA*, 1976 E.C.R. 1735; Case C- 51/97, *Réunion Européenne SA v. Spliethoff's Bevrachtungskantoor BV*, 1998 E.C.R. I-6513.

194. Case C-412/98, *Group Josi Reinsurance Co. SA v. Universal Gen. Ins. Co.*, 2000 E.C.R. I-5925.

195. *E.g.*, Case C-318/93, *Brenner v. Dean Witter Reynolds, Inc.*, 1994 E.C.R. I-4275. For a general analysis, see George Berman & Bernard Audit, *The Application of Private International Norms to "Third Countries": The Jurisdiction and Judgments Example*, in *INTERNATIONAL CIVIL LITIGATION IN EUROPE AND RELATIONS WITH THIRD STATES*, *supra* note 25, at 65–68.

196. See Arthur T. von Mehren, *Recognition and Enforcement of Sister-State Judgments: Reflections on General Theory and Current Practice in the European Economic Community and the United States*, 81 *COLUM. L. REV.* 1044, 1058–59 (1981) (directly juxtaposing the nondiscriminatory Due Process Clause in the United States and the discriminatory provision in Article 3 of the Brussels I regime); see also Kurt H. Nadelmann, *Jurisdictionally Improper Fora in Treaties on Recognition of Judgments: The Common Market Draft*, 67 *COLUM. L. REV.* 995 (1967); see also Friedrich Juenger, *Judicial Jurisdiction in the United States and in the European Communities: A Comparison*, 82 *MICH. L. REV.* 1195, 1211–12 (1984); for due process concerns, see Ronald A. Brand, *Hague Judgments Convention*, *supra* note 19, at 696–701.

197. See the very brief remarks by Bülow, *supra* note 187, at 482–83; see also MARTHA WESER, *CONVENTION COMMUNAUTAIRE SUR LA COMPETENCE JUDICIAIRE ET L'EXÉCUTION DES DÉCISIONS* 274–77 (1975).

198. GEORGES DROZ, *COMPÉTENCE JUDICIAIRE ET EFFETS DES JUGEMENTS DANS LE MARCHÉ COMMUN* (1972).

199. *E.g.*, KROPHOLLER, *supra* note 190, art. 4, para. 1, at 107; PASCAL GROLIMUND, *DRITTSTAATENPROBLEMATIK DES EUROPÄISCHEN ZIVILVERFAHRENSRECHTS* 273–74 (2000).

200. REINHOLD GEIMER, *INTERNATIONALES ZIVILPROZESSRECHT* § 1383, at 436 (4th ed. 2001); SCHACK, *supra* note 166, at 46, no. 103.

vention<sup>201</sup> shows they do not regard its content as unique to intra-Community relations, just as the constitutional law of jurisdiction in the United States is not considered unique to intrastate relations.

## 2. A Horizontal, Multilateral, International, Apolitical Paradigm

Underlying both European practice and theory of jurisdiction is a paradigm very different from that in the United States. First, this paradigm is *horizontal*. European jurisdictional thinking focuses on the horizontal relations between countries rather than on the vertical relation between the court and the parties. This peculiarity is touched on, but not really captured, when comparatists argue that Europeans care less about contacts to the defendant and more about contacts to the controversy. This latter distinction, one of degree rather than of paradigm, does not explain well general jurisdiction in Europe at the defendant's domicile regardless of the controversy.<sup>202</sup> It seems similarly inadequate in explaining specific jurisdiction in U.S. law, which requires a close connection between the forum and the controversy.<sup>203</sup> Rather, the real question of jurisdiction in Europe is neither whether there are sufficient vertical contacts between the defendant and the country whose courts are seized, nor whether such contacts exist between that country and the controversy. The real question is which of several states' courts are the most appropriate to deal with a type of litigation. Jurisdiction is justified vis-à-vis other states with a plausible claim to jurisdiction, not vis-à-vis the defendant and her interest in protection from the court.

Second, jurisdictional thinking in the European tradition is *multilateral*. Of course, jurisdictional rules outside of conventions are necessarily unilateral in effect in the sense that a court can only determine whether it has jurisdiction or not; it cannot designate a foreign court as competent.<sup>204</sup> Even in national laws, however, jurisdiction is

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201. Schlosser *supra* note 17, at 10 ("From the outset, there was a common understanding that the system of the Brussels Convention must be the starting point . . ."); SCHACK, *supra* note 166. For American criticism, see Arthur T. von Mehren, *The Hague Jurisdiction and Enforcement Convention Project Faces an Impasse—A Diagnosis and Guidelines for a Cure*, 20 PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS [IPRAX] 465 (2000); Arthur T. von Mehren & Ralf Michaels, *Pragmatismus und Realismus für die Haager Verhandlungen zu einem weltweiten Gerichtsstands- und Vollstreckungsübereinkommen*, 25 DAJV-NEWSLETTER 124, 126 (2000) (F.R.G.); see also *Conclusions of the second Special Commission meeting on the recognition and enforcement of foreign judgments in civil and commercial matters*, in PROCEEDINGS OF THE EIGHTEENTH SESSION, *supra* note 33, at 185.

202. See Haimo Schack, *Germany*, in DECLINING JURISDICTION IN PRIVATE INTERNATIONAL LAW 189, 194 (J.J. Fawcett ed., 1995).

203. For an explanation of the concept of specific jurisdiction, see von Mehren, *supra* note 142, at 64–65.

204. This represents a difference from choice of law, where foreign law can be applied. Unlike jurisdictional rules, choice of law rules can be truly multilateral if they use the same

allocated according to principles that are at least potentially universal. For German law, this is a natural consequence of its roots in the law of venue: venue rules must be universal because they allocate venue to one of several courts; extension of these principles is therefore also universal at least in attitude. But the connection is not confined to Germany. Authors in the French tradition also claim a multilateral character for their laws of jurisdiction. The use of universal connecting factors implies that if the factor (e.g. the defendant's domicile) lies outside the state, the state does not have jurisdiction.<sup>205</sup> In this view, jurisdiction cannot be denied for any reason other than that another more appropriate forum has jurisdiction.<sup>206</sup>

The multilateral character of jurisdiction in Europe becomes clear once we realize that the criterion for jurisdiction is not a *close* connection, as in U.S. law, but rather the *closest* connection in an abstractly defined category like tort and according to an abstractly defined connecting factor like "place of the tort." Determining the closest connection requires a horizontal comparison between the connections that different countries have with the parties or the dispute. Consequently, the main criterion is not the vertical relation between the state and the defendant but rather the horizontal relation between the court's own state and other states, not fairness towards the defendant but appropriateness vis-à-vis other countries' claims of jurisdiction. Of course, different bases of jurisdiction are available at the same time, and no decision is made regarding which of them constitutes the closest connection. In a contracts case, for example, the plaintiff can sue the defendant both in the defendant's home country<sup>207</sup> and at the place of performance.<sup>208</sup> Forum shopping is possible in Europe, too, and although it is sometimes frowned upon,<sup>209</sup> lawyers recognize that it is both unavoidable and unobjectionable in principle.<sup>210</sup> The point is that only one place of jurisdiction is sought within each category.

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factors for the application of forum law and of foreign law. See JAN KROPHOLLER, *INTERNATIONALES PRIVATRECHT* 565 (4th ed. 2001).

205. WESER, *supra* note 197, at 36–38.

206. *Id.* at 38.

207. Brussels I, *supra* note 18, art. 2; ZPO, *supra* note 21, art. 13.

208. Brussels I, *supra* note 18, art. 5(1); ZPO, *supra* note 21, art. 29.

209. See Case C-334/00, *Fonderie Officine Meccaniche Tacconi SpA v. Heinrich Wagner Sinto Maschinenfabrik GmbH*, 2002 E.C.R. I-7357, Op. Advocate Gen. Geelhoed para. 32. (Jan. 31, 2001); see also Case C-168/02, *Kronhofer v. Maier*, 2004 E.C.R. I-6009, Op. Advocate Gen. Léger paras. 34, 50 (Jan. 14, 2004).

210. Case C-1/04, *Staubitz-Schreiber*, 2005 E.C.R. I-701, Op. Advocate Gen. Ruiz-Jarabo Colomer para. 71 (Sept. 6, 2005); Case C-343/04, *Land Oberösterreich v. ČEZ*, 2006 E.C.R. I-4557, Op. Advocate Gen. Poiares Maduro para. 85 (Jan. 11, 2006); SCHACK, *supra* note 166, at 100, no. 222. In fact, the EU Commission itself engages in forum shopping when it sues tobacco companies before U.S. courts in the hope of getting treble damages under

Third, European jurisdictional thinking is *international*. While the question in a domestic paradigm was whether the dispute or the parties are “in or out” of the jurisdiction, here the jurisdictional question is whether it is for “us or them” to exercise jurisdiction.” “International” does not refer to the character of the Brussels Regulation as an international treaty<sup>211</sup> or to the fact that the Regulation still applies internationally to several nation states. Rather, “international” signifies that what matters is the relation between nations. Jurisdiction can be based on a hypothetical common understanding between countries, a matter of international law. Jurisdictional rules are, at least potentially, universal. There is an obvious parallel to choice of law in a Savignyan tradition, which seeks the “seat” of a legal relationship on the basis of an international community of states.<sup>212</sup>

Finally, the European paradigm is *apolitical*. Matters of private litigation are considered apolitical; the state’s only task is to provide a forum. The right of access to court flows from the plaintiff’s private right against the defendant.<sup>213</sup> The defendant’s freedom from state intervention is irrelevant because the suit is considered a private matter. As a consequence, political theory is rarely used to justify jurisdiction; the relation between the court and the defendant is not generally emphasized.<sup>214</sup> Political theory could appear relevant in the form of international relations theory, but it is largely absent from European debates.<sup>215</sup> The reason is that although the *focus* of jurisdiction is international, its *goal* is the correct adjudication of relations between the parties, where state interests are thought to be largely absent.<sup>216</sup> Just as private law is considered less

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RICO. See Case C-131/03, R.J. Reynolds Tobacco Holdings, Inc. v. Commission, 2006 WL 2593840, Celex No. 603J0131 (Sept. 12, 2006); for the U.S. side of the litigation, see *European Cmty. v. RJR Nabisco, Inc.*, 424 F.3d 175, *cert. denied*, 126 S. Ct. 1045 (2006).

211. While the Brussels Convention was an international treaty, the Brussels Regulation is a legislative instrument of the European Community.

212. For the seat principle, see Ralf Michaels, *Globalizing Savigny? The State in Savigny’s Private International Law and the Challenge of Europeanization and Globalization*, in DEZENTRALISIERUNG. AKTUELLE FRAGEN POLITISCHER UND RECHTLICHER STEUERUNG IM KONTEXT DER GLOBALISIERUNG (Michael Stolleis & Wolfgang Streeck eds., forthcoming 2007), available at <http://ssrn.com/abstract=796228>.

213. But see John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524 (2005).

214. For exceptions, see *supra* note 168.

215. For a comparative analysis using international relations theory, see Samuel P. Baumgartner, *Is Transnational Litigation Different?*, 25 U. PA. J. INT’L ECON. L. 1297 (2004).

216. This may explain why parties can waive the defense of lack of in personam jurisdiction under Brussels I (Art. 24), unlike lack of subject matter jurisdiction under U.S. law (*Arbaugh v. Y&H Corp.*, 126 S. Ct. 1235, 1244 (2006)).

political in Europe than in the United States,<sup>217</sup> so adjudicatory jurisdiction in private law matters is considered apolitical. The goal is to achieve the most appropriate forum and to protect the defendant against the plaintiff, but justifications are usually framed in terms of justice or general interest analysis, not politics. This may strike some as naïve. Obviously, the decision to treat the law of jurisdiction as a private law matter and thereby separate it from political discourse is itself a politically relevant decision. However, although this decision may well be political, allocation itself is not made on the basis of political considerations, but rather in an apolitical manner.

### 3. Subsumption and Externalization of Competing Considerations

An obvious objection to the analysis so far mirrors the objection to the analysis of U.S. jurisdiction above. There, the question was whether one could really say that U.S. law of jurisdiction does not deal with allocational concerns in a multilateral fashion. Here, the question is whether one can really say that European law of jurisdiction ignores vertical relations between the court and the defendant. The answer also mirrors the answer given above: such considerations are important in Europe (though maybe less so than multilateral considerations are relevant in American thought), but they are either subsumed into a horizontal approach or externalized to other institutions.

First, subsumption: common law practitioners sometimes argue that the common law cares more about justice for the parties, while the civil law cares more about relations between states.<sup>218</sup> In part, this reading is compatible with the paradigmatic difference developed in this Article. The civil law, as embodied in European thinking about jurisdiction, is international in the sense that it emphasizes relations between countries. The common law, as embodied particularly in U.S. thinking about jurisdiction, is vertical in the sense that it emphasizes individual rights. This reading is flawed, however, if it insinuates that only the common law cares about justice for the parties.<sup>219</sup> The truth is more complex: both paradigms prize justice, but they do so in different ways. Contrary to

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217. Nils Jansen & Ralf Michaels, *Private Law Beyond the State? Europeanization, Globalization, Privatization* Europeanization, Globalization, Privatization, 54 AM. J. COMP. L. (forthcoming 2007).

218. PETER B. CARTER, *Anti-Suit Injunctions in Private International Law*, 368 VORTRÄGE, REDEN UND BERICHTE AUS DEM EUROPA-INSTITUT SEKTION RECHTSWISSENSCHAFT 13 (1997), available at <http://europainstitut.de/euin/schrift/download/368.pdf>; Hartley, *supra* note 23, at 814–15; Trevor C. Hartley, *How to Abuse the System and (Maybe) Come Out on Top: Bad-Faith Proceedings Under the Brussels Jurisdiction and Judgments Convention*, in LAW AND JUSTICE IN A MULTISTATE WORLD—ESSAYS IN HONOR OF ARTHUR T. VON MEHREN, *supra* note 46, at 81.

219. It is equally flawed if it insinuates that only the civil law cares about relations with other states or countries; see *supra* Part III.A.3.

frequent misperceptions, fairness is by no means unimportant in European jurisdictional thought. While in U.S. law, the protection of defendants is usually not addressed as a problem in their relation to the court,<sup>220</sup> in Europe this protection is subsumed within the horizontal debate on proper allocation of jurisdiction. The defendant is protected not against the court exercising jurisdiction but against the plaintiff who chooses that court—a subtle but important distinction.

Fairness plays out in formal and substantive ways. Formally, Europeans would question the asserted discrepancy between justice and consistency.<sup>221</sup> To them, the predictability achieved by the Brussels rules is itself an important element of fairness to the parties.<sup>222</sup> Substantively, Europeans would argue that the rules of the Brussels Regulation are based on justice considerations. The priority given to jurisdiction in the defendant's home country is justified with the defendant's interest in being sued at home except under certain conditions. One may deem this protection ineffective (because in fact the plaintiff can frequently sue at another forum of her choice)<sup>223</sup> or misplaced (because it does not account sufficiently for the interests of the plaintiff),<sup>224</sup> but one cannot claim that European law of jurisdiction does not address the interests of defendants.

The rules of the Brussels Regulation serve not only to establish detailed rules of allocation of jurisdiction, but also to fulfill the quasi-constitutional function of restricting jurisdiction in order to protect defendants' due process rights.<sup>225</sup> First, such protection is accomplished through Article 3, which ensures that domiciliaries of the European Union can only be sued in a court designated by the rules of the Brussels Regulation. Although this protection is not extended to defendants domiciled in other countries,<sup>226</sup> the ECJ has made clear that the protection applies also against plaintiffs from non-member states.<sup>227</sup> Second, the Court has held repeatedly that Article 2, which gives general jurisdiction to the defendant's domicile, serves as a general principle for the interpre-

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220. Due process does enter the analysis as a restriction with regard to specific bases of international jurisdiction; for Article 23 of the German Code of Civil Procedure, see von Mehren, *supra* note 10, at 174–77; KLEINSTÜCK, *supra* note 168, at 166–88.

221. *Supra* note 23.

222. Case C-26/91, *Handte & Co. v. Traitements Mécano-chimiques des Surfaces S.A.*, 1992 E.C.R. I-3967, para. 15; SCHACK, *supra* note 166, at 94, no. 203; KROPHOLLER, *supra* note 190, before art. 2, no. 20, at 101; Gardella & Radicati di Brozolo, *supra* note 185, at 614.

223. von Mehren, *supra* note 10, at 192.

224. The plaintiff's interests are externalized to the right of access to court; *see infra*, Part IV.A.

225. *See* Michaels, *supra* note 59, at 153–54.

226. Brussels I, *supra* note 18, art. 4(1); for discussion, *see infra* Part IV.B.

227. Case C-412/98, *Group Josi Reinsurance Co. SA v. Universal Gen. Ins. Co.*, 2000 E.C.R. I-5925; Bundesgerichtshof [BGH] [Federal Court of Justice] Sept. 28, 2005, XII ZR 17/03 (II.1.b) (F.R.G.). *See also* 20 NJW-RECHTSPRECHUNGSREPORT (NJW-RR) 1593 (2005).

tation of other provisions of the Brussels Regulation, so specific bases of jurisdiction must be construed narrowly.<sup>228</sup> This is intended to protect defendants. Third, each of the provisions on specific jurisdiction is justified by the close connection between the dispute and the court called upon for its resolution.<sup>229</sup> This serves the double function of ensuring that only one of the member states has specific jurisdiction for a certain category (e.g., contract) and that the defendant is not sued in an inconvenient forum.<sup>230</sup> Fourth, the Court is willing to restrict the application of certain problematic provisions. For example, it restricts the jurisdiction of Brussels I Article 6(2) for third-party proceedings to cases in which there is a “a sufficient connection between the original proceedings and the third party proceedings to support the conclusion that the choice of forum does not amount to an abuse.”<sup>231</sup> While these words are reminiscent of the minimum contacts test developed under the Due Process Clause of the U.S. Constitution,<sup>232</sup> the source for the ECJ is not Article 6(1) of the European Convention on Human Rights, the European provision on due process, but rather the Brussels Regulation itself.<sup>233</sup>

Some critics argue that the Brussels Regulation performs the function of restricting jurisdiction for the protection of defendants inadequately,<sup>234</sup> just as the Due Process Clause of the U.S. Constitution performs the function of accounting for federal interests inadequately.<sup>235</sup> First, the text of the Regulation cannot easily be adapted in individual

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228. See, e.g., Case C-168/02, *Kronhofer v. Maier*, 2004 E.C.R. I-6009, paras. 12–14; Case C-26/91, *Handte & Co. v. Traitements Mécano-chimiques des Surfaces S.A.*, 1992 E.C.R. I-3967, para. 14; Case 32/88, *Six Constructions v. Humbert*, 1989 E.C.R. 341, para. 18; Case 189/87, *Kalfelis v. Bankhaus Schröder, Münchmeyer, Hengst & Co.*, 1988 E.C.R. 5565, para. 19.

229. *Jenard Report*, *supra* note 189, at 22; Case 21/76, *Bier v. Mines de Potasse*, 1976 E.C.R. 1735, paras. 10–11; Case 56/79, *Zelger v. Salinitri*, 1980 E.C.R. 89, para. 3; Case C-220/88, *Dumez France v. Hessische Landesbank*, 1990 E.C.R. I-49, para. 17; Case C-68/93, *Fiona Shevill v. Presse Alliance*, 1995 E.C.R. I-415, para. 19; *Réunion Européenne v. Spliethoff's Bevrachtungskantoor*, 1998 E.C.R. I-6513, para. 27; Case C-256/00, *Besix v. WABAG*, 2002 E.C.R. I-1699, paras. 30–31; Case C-37/00, *Weber v. Ogden Universal Services*, 2002 E.C.R. I-2013, para. 39; Case C-168/02, *Kronhofer v. Maier*, 2004 E.C.R. I-6009, para. 15.

230. For jurisdiction in contracts and torts, see the analysis in Michaels, *supra* note 59, at 151–54; cf. Horatia Muir Watt, *Book Review*, 94 *REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ* 865, 867–68 (2005) (“enlightening distinction”).

231. Case C-77/04, *GIE Réunion Européenne v. Zurich España*, Soptrans., 2005 E.C.R. I-4509, para. 36 (concerning Brussels Art. 6(2), dealing with third party claims. Art. 6(2) would be problematic under U.S. constitutional law after the decision in *Asahi*, 480 U.S. 102).

232. Note, however, that a sufficient connection must exist to the main proceedings, not to the court.

233. See *supra* Part II.B.2.

234. See Peter Schlosser, *Jurisdiction in International Litigation—The Issue of Human Rights in Relation to National Law and to the Brussels Convention*, 74 *RIVISTA DI DIRITTO INTERNAZIONALE* 5 (1991).

235. *Supra* Part III.A.3.



cases; the ECJ has repeatedly rejected flexible interpretation of its provisions.<sup>236</sup> Second, some applications remain problematic. For example, the possibility that Brussels I Article 5(3) gives jurisdiction in product liability cases to the place of the accident even if that place was unpredictable for the defendant would arguably amount to a violation of due process.<sup>237</sup> As with allocational concerns in the United States,<sup>238</sup> scholars draw opposite conclusions. One is to base restrictions of jurisdiction on texts outside the Regulation, especially the European Convention on Human Rights.<sup>239</sup> The other is to ignore such considerations altogether.

Yet, the need to consider due process issues is less urgent once we account for the ways in which defendant protection is externalized out of the law of jurisdiction altogether. The most important such mechanism is choice of law. In the United States, adjudicatory jurisdiction is in a majority of cases similar to legislative jurisdiction,<sup>240</sup> and if a court finds that it has jurisdiction, it will frequently apply its own law.<sup>241</sup> This is true in particular for international cases in federal courts, where a court's subject matter jurisdiction depends on the applicability of U.S. federal law rather than foreign law.<sup>242</sup> But even in cases in which foreign law could be applied, such application is relatively rare. In domestic courts and interstate cases, the U.S. Supreme Court has traditionally confined constitutional constraints regarding choice of law to a minimum.<sup>243</sup> American scholars have criticized this discrepancy. Linda Silberman famously quipped, "To believe that a defendant's contacts with the forum should be stronger under the Due Process Clause for jurisdictional purposes than for choice of law is to believe that an accused is more concerned with where he will be hanged than whether."<sup>244</sup> Yet presumably, the accused cares neither where he will be hanged (personal jurisdiction), nor according to whose laws (choice of law); he simply hopes that either

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236. See JACCO BOMHOFF, *JUDICIAL DISCRETION IN EUROPEAN LAW ON CONFLICTS OF JURISDICTION* 31–34 (2005).

237. Schlosser, *supra* note 17, at 34–36.

238. See *supra* text accompanying notes 132, 146–48.

239. See Guinchard, *supra* note 66; Grolimund, *supra* note 66, at 108–14; Nuyts, *supra* note 50, at 55–56; Schlosser, *supra* note 17, at 11–12.

240. See WEINTRAUB, *supra* note 14, at 120–22.

241. SCOLES ET AL., *supra* note 9, at 167.

242. The relationship between subject matter jurisdiction and prescriptive jurisdiction is still unclear. See *United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942 (7th Cir. 2003) (en banc).

243. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981). The U.S. Supreme Court seemed to suggest otherwise in *Phillips Petroleum Co. v. Shutts*, recognizing that "[t]he issue of personal jurisdiction . . . is entirely distinct from the question of the constitutional limitations on choice of law." 472 U.S. 797, 821 (1985). But its next decision in the same case proved this to be largely lip service. See *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988).

244. Linda J. Silberman, Shaffer v. Heitner: *The End of an Era*, 53 N.Y.U. L. REV. 33, 88 (1978).

jurisdiction or choice of law lead to a favorable result. In this sense, restrictions on jurisdiction and restrictions on choice of law can act as functional equivalents; a legal order can use one or the other for the same purpose.<sup>245</sup> While U.S. law has focused on the former and neglected the latter, European law has concentrated on the latter while neglecting the former. Some areas of choice of law have been unified (most importantly contract law)<sup>246</sup> or are about to be (most importantly tort law).<sup>247</sup> But even in areas that are not unified, European choice of law has traditionally preferred potentially universal rules over rules that favor forum law.<sup>248</sup> As a consequence, parties are protected from courts applying home law against them better than in the United States. One explicit policy behind such universal rules is the desire to reduce the incentive for forum shopping. If the applicable law is the same no matter which forum the plaintiff chooses, then forum shopping has less impact on the outcome of cases. In fact, one important impetus for the unification of choice of law rules for contractual obligations lay in the law of jurisdiction, in particular Article 5(1) of the Brussels Regulation, which gives jurisdiction to the place of performance. Now that choice of law for contracts has been unified, courts all over the European Union must apply the same law to determine the place of performance and should, therefore, find the same courts to have jurisdiction under Article 5(1).

#### IV. SOME PRACTICAL CONSEQUENCES OF THE PARADIGMATIC DIFFERENCE

The paradigmatic difference is plausible in theory. But does it matter in practice, especially since paradigms do not determine outcomes? The

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245. See Harold G. Maier & Thomas R. McCoy, *A Unifying Theory for Judicial Jurisdiction and Choice of Law*, 39 AM. J. COMP. L. 249 (1991) (suggesting the use of choice of law criteria for adjudicatory jurisdiction).

246. See, e.g., Convention on the Law Applicable to Contractual Obligations (Consolidated Version), 1998 O.J. (C 27) 34 (EC); *Proposal for a European Parliament and Council Regulation on the Law Applicable to Contractual Obligations*, COM (2005) 650 final (Dec. 15, 2005) [hereinafter Rome I]. The Convention will likely be turned into a Community instrument.

247. *Amended Proposal for a European Parliament and Council Regulation on the Law Applicable to Non-Contractual Obligations*, COM (2006) 83 final (Feb. 21, 2006) [hereinafter Rome II]; for the most recent version, see Council Common Position (EC), Interinstitutional File 2003/0168 (COD), available at <http://register.consilium.europa.eu/pdf/en/06/st09/st09751-re07ad01.en06.pdf>.

248. See MATHIAS REIMANN, *CONFLICT OF LAWS IN WESTERN EUROPE: A GUIDE THROUGH THE JUNGLE* 105–09 (1994). But see, for a concealed European trend towards applying forum law, Th. M. de Boer, *Forum Preferences in Contemporary European Conflicts Law: The Myth of a “Neutral Choice”*, in 1 Festschrift für Erik Jayme 39 (Heinz-Peter Mansel et al. eds., 2004).

answer is a clear yes: the difference matters a great deal. While paradigms do not determine outcomes, they shape the discourse that leads to outcomes. This can be observed in the comparison of U.S. and European jurisdictional law. The difference can explain why Americans and Europeans, when talking about issues of jurisdiction, talk past each other. It can account for the style of arguments on each side in negotiations, for conflicting views on specific issues, and for different views within what look like apparent similarities.

#### A. *The Role of Due Process*

The paradigmatic difference can both highlight and account for differences that go almost unnoted in the literature. One of these is the fact that due process actually does play a role in European jurisdictional thought, but its role is directly opposite to that played in the United States. While the Due Process Clause in the United States protects the *defendant* against the unjustified *assertion* of jurisdiction, the fair trial principle in European law protects the *plaintiff* against the unjustified *denial* of jurisdiction.<sup>249</sup> This is achieved through the doctrine of right of access to court, protected under ECHR Article 6(1)<sup>250</sup> and the European Charter of Fundamental Rights,<sup>251</sup> as well as national constitutional provisions like Article 101(1) of the German Basic Law.

This shows that the relevant difference between European and American jurisdictional law is not that European law is not constitutionalized. Each system is constitutionalized, but only in one regard: whereas Europe hardly protects defendants under its due process test (although it could),<sup>252</sup> U.S. law does not endorse an explicit general right of access to court.<sup>253</sup> Such a right can be found only indirectly in two other doctrines. The first is jurisdiction by necessity, the idea that a court has exceptional jurisdiction if justice so demands, even absent the usual

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249. Peter D. Trooboff, *Ten (and Probably More) Difficulties in Negotiating a Worldwide Convention on International Jurisdiction and Enforcement of Judgments: Some Initial Lessons*, in A GLOBAL LAW OF JURISDICTION: LESSONS FROM THE HAGUE 263, 271–72 (John J. Barceló III & Kevin M. Clermont eds., 2002).

250. *Golder v. United Kingdom*, App. No. 4451/70, 1 Eur. Ct. H.R. (ser. A) 524, para. 36 (1979); *Airey v. Ireland* (No. 1), App. No. 6289/73, 2 Eur. Ct. H.R. (ser. A) 305 (1979); Grolimund, *supra* note 66, at 94–95.

251. Charter of Fundamental Rights of the European Union art. 47, Dec. 7, 2000, O.J. (C 364) 1, 40 I.L.M. 266 (2001), available at [http://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/text_en.pdf).

252. *Supra* Part II.B.1.

253. The desire of a state to grant an effective forum can, however, be a relevant criterion regarding constitutionality of exercising jurisdiction. See *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957).

requirements, because no other forum is available to the plaintiff.<sup>254</sup> This idea has occasionally been used to rationalize court decisions<sup>255</sup> but is usually either confined to a minimum<sup>256</sup> or rejected out of hand as an independent basis for jurisdiction.<sup>257</sup> The U.S. Supreme Court has suggested such a basis might be possible,<sup>258</sup> but has never endorsed it. The second doctrine is the duty of courts to exercise the jurisdiction they have been given by the legislature, which is sometimes used as an argument against *forum non conveniens*.<sup>259</sup> Notably, this duty exists between the court and the legislature; the benefit to the plaintiff is merely incidental. In Europe, by contrast, the plaintiff has an explicit right of access to court.

To understand this striking contrast, it is first necessary to place it in context. It is not the case that Americans care more about defendants while Europeans care more about plaintiffs. If anything, the opposite is true. As one expert has put it, with some overstatement, "American courts are the plaintiff's heaven. In contrast, the European courts, particularly the German courts, are the defendant's heaven."<sup>260</sup> That the U.S. Constitution protects defendants while European constitutional law protects plaintiffs is not meant to create an imbalance but rather to counter an imbalance that would otherwise exist. Without restrictions, U.S. law of jurisdiction would be extremely plaintiff-friendly, and European law would be extremely defendant-friendly.

However, this insight only shifts the question; we still need to know why these respective imbalances exist. The paradigmatic difference, combined with a historical picture, provides an explanation that can be sketched as follows. In a world with relatively few transnational transactions, where each party and each transaction could clearly be placed in one and only one state, the paradigmatic difference would not matter:

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254. Tracy L. Troutman, Note, *Jurisdiction by Necessity: Examining One Proposal for Unbarring the Doors of our Courts*, 21 VAND. J. TRANSNAT'L L. 401 (1988); SCOLES ET AL., *supra* note 9, at 348–50.

255. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); see George B. Fraser, *Jurisdiction by Necessity—An Analysis of the Mullane Case*, 100 U. PA. L. REV. 305 (1951); Martin H. Redish & Eric J. Beste, *Personal Jurisdiction and the Global Resolution of Mass Tort Litigation: Defining the Constitutional Boundaries*, 28 U.C. DAVIS L. REV. 917, 936–37 (1995).

256. von Mehren, *supra* note 100, at 322; Troutman, *supra* note 254; SCOLES ET AL., *supra* note 9, at 350.

257. Brilmayer, *supra* note 117, at 108–10; Stanley E. Cox, Symposium, *Case Four: Choice of Law Theory*, 20 NEW ENG. L. REV. 684, 685 n.2 (1995).

258. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 418 n.13 (1984); *Shaffer v. Heitner*, 433 U.S. 186, 211 n.37 (1977).

259. For the similar argument in German law, see Schack, *supra* note 202, at 194.

260. See Schlosser, *supra* note 17, at 37.

both a domestic and an international paradigm would always lead to exactly one state having jurisdiction. The rise in international transactions in the nineteenth and twentieth centuries upset this parallelism between the domestic and the international paradigms, since it had opposite effects on each paradigm. For the U.S. paradigm, with its unilateral and vertical focus, it led to ever more courts with jurisdiction, since more courts had a certain degree of contact with the parties or the transactions.<sup>261</sup> The legal system reacted by restricting the number of available fora by providing for protection of defendants based on fairness. The effect on the multilateral European paradigm was exactly the opposite. Here, potential defendants were able to play the system and make sure the closest connection, which alone gives jurisdiction, existed to a court in which effective protection of plaintiffs was not possible. The legal system reacted by providing a right to effective judicial protection. The paradigmatic difference does not lead, therefore, to a necessary difference in the respective protection of plaintiffs and defendants. In effect, it may or may not be the case that plaintiffs and defendants are both protected to the same degree in the U.S. and in Europe. But the way in which this balance is achieved is very different.

*B. Natural Forum and Discrimination Against  
Third Country Domiciliaries*

Another issue onto which the paradigmatic difference sheds light is the discrimination between domestic and foreign parties. Both U.S. and European laws of jurisdiction discriminate against foreigners, but they do so in different ways. While European law distinguishes between domestic and foreign *defendants* in the application of the Brussels regime, U.S. law distinguishes between domestic and foreign *plaintiffs* in the application of *forum non conveniens*. The existence of both these forms of discrimination can be explained with the paradigmatic difference: what seems almost shockingly unjust within one paradigm is perfectly normal in another.

U.S. law does not discriminate against foreign *defendants*; the Due Process Clause protects both U.S. and foreign citizens and domiciliaries.<sup>262</sup> Europe, by contrast, distinguishes between European and foreign defendants: the Brussels Regulation protects European defendants against the expansive bases of jurisdiction still existing under member state laws, but this protection does not extend to non-EU residents, against whom the exorbitant national bases of jurisdiction can still

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261. See Michaels, *supra* note 12, at 53.

262. See Troutman, *supra* note 254.

be used.<sup>263</sup> Although such judgments rest on jurisdictional bases explicitly condemned by the Brussels Regulation, these judgments are still entitled to automatic recognition within the European Union; other member states cannot even invoke a public policy exception against these bases.<sup>264</sup> Whereas Americans have been extremely critical of this discrimination,<sup>265</sup> only some Europeans concur with the criticism;<sup>266</sup> more often they do not see anything wrong with the distinction.<sup>267</sup>

The situation is reversed with regard to foreign *plaintiffs*. Here it is European law that draws no distinction between domestic and foreign plaintiffs.<sup>268</sup> U.S. law, by contrast, explicitly distinguishes between foreign and domestic plaintiffs,<sup>269</sup> to some limited extent in the law of jurisdiction,<sup>270</sup> but more importantly in the application of *forum non conveniens*, where the plaintiff's domicile is a decisive factor in determining the relative appropriateness of the U.S. forum.<sup>271</sup> Europeans view this as blatant and unjustified protectionism,<sup>272</sup> while many Americans see nothing wrong in closing their courts to what they perceive as forum shopping by foreigners.

Why do Europeans condone discrimination against foreign defendants, while Americans have no problem with discriminating against foreign plaintiffs? One important explanation is that Europeans consider the defendant's domicile the natural forum and another forum chosen by the plaintiff as the exception,<sup>273</sup> while Americans think of the plaintiff's

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263. See *supra* text accompanying notes 194–201.

264. See Case C-7/98, *Krombach v. Bamberski*, 2000 E.C.R. I-1935; Brussels I, *supra* note 18, art. 35(3).

265. See, especially, von Mehren, *supra* note 196, at 1058–59 (1981) (directly juxtaposing the nondiscriminatory due process clause in the United States and the discriminatory provision in Article 3 of the Brussels I regime); for further references, see *supra* note 196.

266. *Supra* note 194.

267. Hélène Gaudemet-Tallon, *Les frontières extérieures de l'espace judiciaire européen: quelques repères*, in E PLURIBUS UNUM—LIBER AMICORUM GEORGES A.L. DROZ 85, 85–87 (Alegria Borrás et al. eds., 1996). See GROLIMUND, *supra* note 199, at 218 (suggesting that the discrimination against foreigners as such creates no problems; only the exorbitant character of the national bases of jurisdiction applied against them is potentially problematic).

268. Case C-412/98, *Group Josi Reinsurance Co. SA v. Universal Gen. Ins. Co.*, 2000 E.C.R. I-5925. See also Schlosser, *supra* note 17, at 24 (“a fundamental human judicial right”).

269. This question is distinct from the more general question of whether foreign plaintiffs fare better or worse generally than domestic plaintiffs. For the most recent empirical studies suggesting that they fare equally well, see Kevin M. Clermont & Theodore Eisenberg, *Xenophilia or Xenophobia in American Courts? Before and After 9/11*, (Cornell Law Sch. Legal Studies Research Paper Series, 06-018, Aug. 08, 2006), available at <http://ssrn.com/abstract=923595>.

270. See *Asahi Metal Indus. Co., Ltd. v. Super. Ct. of Cal.*, 480 U.S. 102 (1987).

271. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255–56 (1981).

272. SCHACK, *supra* note 166, at 220, no. 496.

273. *Supra* note 228.

domicile as the natural forum, which is unacceptable only when jurisdiction there would violate the defendant's due process rights. But this answer immediately creates a new question: why do Americans and Europeans differ on what is the natural forum?

Again, the paradigmatic difference provides a clue. As regards U.S. law, recall that the U.S. paradigm is political. Jurisdiction over defendants must be justified in political terms, especially if those defendants are not part of the community that asserts jurisdiction. On the flipside of this argument, courts have a political responsibility to provide protection for their own citizens' rights, and therefore to open their courts to them, even where they would not open them to others. U.S. courts frequently invoke this notion of a political relationship between courts and their domiciliaries.

Notably, such invocations are absent from European decisions on jurisdiction. Here, discrimination against foreign defendants is not seen as a problem simply because jurisdiction is viewed as apolitical. The original reason for the discrimination was merely one of limited competence in the European Union: since the goal was unification of laws within the common market, third country domiciliaries were simply not at stake.<sup>274</sup> The Brussels Convention did not go beyond what seemed necessary for the common market. The international relationship to other countries that defined the paradigm was simply different vis-à-vis EU member states and other States. In the United States, the situation would be the same if the constitutional law of jurisdiction were based on the Full Faith and Credit Clause rather than the Due Process Clause, because full faith and credit would also limit jurisdiction only vis-à-vis sister states, not vis-à-vis foreign nations.<sup>275</sup> Currently, calls in Europe to abolish the discrimination against foreign defendants are growing louder,<sup>276</sup> a sign that this discrimination is now viewed as a mere accident.

### *C. State Boundaries and Extraterritoriality*

The paradigmatic difference not only explains manifest differences, but also reveals that some apparent similarities rest on misunderstanding. One such apparent similarity is the prominence of territorial connections and state boundaries within each paradigm.<sup>277</sup> Territoriality is still central to jurisdictional thinking in both the United States and Europe. In the United States, the territorial focus has survived the shift in theories in

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274. *Supra* text accompanying notes 197–198.

275. *See* *Aetna Life Ins. Co. v. Tremblay*, 223 U.S. 185, 190 (1912) (regarding enforcement of foreign nation judgments).

276. *Supra* note 199.

277. *See* Ralf Michaels, *Territorial Jurisdiction After Territoriality*, in *GLOBALISATION AND JURISDICTION* 105, 107–13 (Piet-Jan Slot & Mielle Bulterman eds., 2004).

U.S. jurisdictional law.<sup>278</sup> For example, the move from service of process in *Pennoyer* to minimum contacts in *International Shoe* as a requirement for jurisdiction did not change the fact that jurisdiction is still about state borders, and minimum contacts are contacts to a territory.<sup>279</sup> Similarly, jurisdiction in Europe is still largely about places:<sup>280</sup> the most important connecting factors—the defendant’s residence, the place of the tort, and the place of performance—are all territorial. Extraterritorial jurisdiction is rejected by both legal systems (at least in principle) and requires special justification.<sup>281</sup>

Yet, in accordance with their respective paradigms, Americans and Europeans understand extraterritoriality to mean different things. Although territoriality and state boundaries are central to both U.S. and European thinking about jurisdiction, they play different roles in each paradigm. In the domestic U.S. paradigm, the role of boundaries is one of *delimitation*. The power of a court goes to the state’s boundaries, not beyond them. It is fair to force a defendant into a court in the state with minimum contacts, but not beyond its boundaries. This delimiting function protects the jurisdiction of other states, but the interference with other states’ interests is not in itself a limit on jurisdiction (as it would be if it were based on the Full Faith and Credit Clause); it is merely incidental to protecting the defendant.<sup>282</sup> By contrast, the role of state boundaries in the international European paradigm is one of *allocation*: the locus of an event or a party defines the place that has jurisdiction in a multilateral fashion. The problem with extraterritorial jurisdiction is that it interferes with another state’s jurisdiction, not that it exceeds the forum state’s power over the defendant, because the power aspect of jurisdiction is not emphasized in the first place. Here, the protection of the defendant against the court is merely incidental to this allocational function.<sup>283</sup>

These differences may appear subtle, but they become relevant in real cases. Europeans frequently accuse U.S. courts of judicial hegemonialism, because U.S. courts assert jurisdiction without regard to other countries.<sup>284</sup> This is clearly a criticism reflecting an international para-

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278. For a more general history of the importance of territoriality in U.S. law and foreign relations, see Kal Raustiala, *The Evolution of Territoriality: International Relations and American Law*, in TERRITORIALITY AND CONFLICT IN AN ERA OF GLOBALIZATION 219 (Miles Kahler & Barbara Walter eds., 2006).

279. Weinstein, *supra* note 78, at 210; *see also* *Burnham v. Super. Ct. of Cal.*, 495 U.S. 604, 609–10 (1990).

280. Michaels, *supra* note 59, at 129.

281. Michaels, *supra* note 12, at 51.

282. *Supra* Part III.C.1.

283. *Supra* Part III.B.3.

284. *Supra* note 12.



digm, in which the vertical relationship of equality between different states is prime. Within a vertical and domestic paradigm, these relations are secondary to the relationship between court and the parties<sup>285</sup>—hegemonialism is at best incidental to, but certainly not a goal of U.S. assertions of jurisdiction. By contrast, where Americans criticize certain European bases of extraterritorial jurisdiction, they do so with a view to the interests of defendants. Exorbitant bases of jurisdiction are criticized not because they violate the interests of other countries, but because they violate the interests of defendants.<sup>286</sup> This reflects a horizontal paradigm.

Sometimes, this clash in perspective is visible in one case. European protests against U.S. assertions of extraterritorial jurisdiction, based on international concerns, frequently meet the response that such assertion is necessary for the protection of rights, based on domestic concerns.<sup>287</sup> How the paradigmatic difference plays out in practice can be seen best in a rereading of the U.S. Supreme Court's decision in *Hartford Fire v. California*,<sup>288</sup> which, although it concerns legislative rather than adjudicatory jurisdiction, is symptomatic of the paradigmatic difference. When U.S. courts asserted jurisdiction over British reinsurers based on the effects of their conduct on the U.S. market, Europeans protested against what they perceived as unjustified extraterritorial jurisdiction. The arguments by Europeans and the Court revealed the paradigmatic difference. Europeans criticized U.S. courts for interfering with their sovereign interests by disallowing conduct that was perfectly legal in the United Kingdom only because of the effects they had on the U.S. market. This protest was based on an international paradigm, focusing on the territorial allocation of jurisdiction between different countries. In this conflict of competing policies, they argued, Europeans should prevail because the defendants and their conduct were located in Europe. The response by the majority in the U.S. Supreme Court did not really address this criticism at all. Curiously, the Court held there was no true conflict:<sup>289</sup> since the conduct that was illegal under U.S. law was not required under U.K. law, the defendants were not in a true conflict situation—they could easily comply with both laws. Obviously, the notion of a true conflict was different for the U.S. Supreme Court. The U.S. response focused not on the horizontal conflict between *countries*

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285. See also Michaels, *supra* note 12, at 53.

286. See *supra* notes 20–22.

287. See Michaels, *supra* note 12, at 46–47, 52.

288. 509 U.S. 764 (1993).

289. *Id.* at 799. The dissent addressed international concerns under the rubric of comity. See also Andreas Lowenfeld, *Conflict, Balance of Interests, and the Exercise of Jurisdiction to Prescribe: Reflections on the Insurance Antitrust Case*, 89 AM. J. INT'L L. 42, 50 (1995) (pointing out that the Court misunderstood the Restatement (Third) of Foreign Relations Law).

(as had the European criticism), but on the conflicting vertical obligations of the *defendant*. Here, no such undue interference existed, because the defendants did not face a conflict. For Europeans, the conflict was a horizontal one between the United States and the United Kingdom. For Americans, the potential conflict could be only a vertical one between the requirements set by U.S. law and the conflicting requirements set by the defendant's home country law.

Another example concerns extraterritorial jurisdiction over places within no country's territory. In *Smith v. United States*,<sup>290</sup> the U.S. Supreme Court held the Federal Tort Claims Act (FTCA) inapplicable to torts committed in Antarctica because Antarctica was a foreign country for purposes of the Act. Obviously, this decision is not made out of an international concern about interfering with another country's jurisdiction, because Antarctica has no government.<sup>291</sup> As a consequence, the plaintiff in *Smith* was left without an effective forum.<sup>292</sup> The same argument was made, although ultimately without success, against federal court jurisdiction over detainees in Guantánamo Bay.<sup>293</sup> Although the question was about territorial boundaries,<sup>294</sup> no one seriously considered the jurisdiction of Cuban courts as an alternative to U.S. court, as one would in an international paradigm.

Although European courts have also looked to international law in order to determine the territorial contacts necessary for jurisdiction,<sup>295</sup> the result in *Smith*, insofar as it concerns adjudicatory jurisdiction, would be unlikely in Europe.<sup>296</sup> First, adjudicatory jurisdiction always lies in defendants' home courts, and territorial restrictions in statutes are matters for choice of law, not adjudicatory jurisdiction. Second, jurisdiction is declined only in view of other available fora;<sup>297</sup> if no other forum is available, denying jurisdiction would violate the plaintiff's right of access to courts. This argument is consistent with an international

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290. 507 U.S. 197, 201–02 (1993); similarly, for the Fair Labor Standards Act, see *Smith v. Raytheon Co.*, 297 F. Supp. 2d 397, 401–02 (D. Mass. 2004). *But see* *Arnett v. Comm'r*, 126 T.C. 89, 95 (2006) (Antarctica is not a foreign country for purposes of the Tax Code).

291. Brilmayer, *supra* note 116, at 295; BRILMAYER, *supra* note 104, at 271.

292. Jonathan Blum, Note, *The Deep Freeze: Torts, Choice of Law, and the Antarctic Treaty Regime*, 8 EMORY INT'L L. REV. 667, 669, 686 (1994).

293. *Rasul v. Bush*, 542 U.S. 466, 498–500 (2004) (Scalia, J. dissenting).

294. See Kal Raustiala, *The Geography of Justice*, 73 FORDHAM L. REV. 2501 (2005).

295. See Case C-37/00, *Weber v. Ogden Universal Services*, 2002 E.C.R. I-2013 (applying the 1958 Geneva Convention on the Continental Shelf in order to determine whether a platform off the Dutch coast was in the Netherlands for the purpose of article 5(1) of the Brussels Regulation).

296. See Michaels, *supra* note 59, at 134–36.

297. *Supra* text accompanying notes 205–06.

paradigm, in which the limits of the forum state's sovereignty as such play a lesser role,<sup>298</sup> while allocational issues matter more.

D. Forum non conveniens, Lis alibi pendens,  
and Parallel Proceedings

The paradigmatic difference can also serve to explain the difference in American and European attitudes towards specific doctrines, notably *forum non conveniens*, *lis alibi pendens*, and antisuit injunctions. *Forum non conveniens*, by now an important doctrine of U.S. law, is rejected in Europe. The European Court of Justice has refused to allow U.K. courts to apply the doctrine in cases without connections to any member states.<sup>299</sup> Many explain this difference by pointing out that Europeans favor consistency and predictability over justice in individual cases, whereas Americans focus more on justice in individual cases and less on predictability and consistency.<sup>300</sup> It is true that predictability played an important role when the ECJ rejected *forum non conveniens* in the Brussels Regulation.<sup>301</sup> But U.S. courts emphasize formalism in applying rules in other areas of the law, while Europeans grant discretion to their courts.<sup>302</sup> The difference regarding *forum non conveniens* must be explained otherwise.

Here again, the paradigmatic difference is helpful. The comparison to this point has made clear that, in U.S. law, *forum non conveniens* serves two purposes not covered appropriately by the Due Process Clause. The first is the function of judicial "fine tuning"<sup>303</sup>—the development of specific rules for the individual case. The second is the function of "jurisdictional equilibration"<sup>304</sup>—the horizontal, international allocation of jurisdiction in view of other countries' positions. In Europe, where both these functions are served by the normal jurisdiction provisions, *forum non conveniens* would add little in this respect. Europeans point out that the need for *forum non conveniens* is reduced with increased specificity and quality of rules on jurisdiction:<sup>305</sup> "fine tuning" is unnecessary if jurisdictional rules are already finely tuned. More generally, the rules on jurisdiction contained in regimes like the Brussels

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298. Michaels, *supra* note 59, at 136.

299. Case C-281/02, *Owusu v. Jackson*, 2005 E.C.R. I-1383.

300. Clermont, *supra* note 49, at 103–04; BOMHOFF, *supra* note 236, at 30–34.

301. *Owusu*, 2005 E.C.R. I-1383, paras. 39–41.

302. P.S. ATIYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW 32 (2005) ("the American system relies far more on formal reasoning than many English lawyers believe."); BOMHOFF, *supra* note 236.

303. von Mehren, *supra* note 10, at 306.

304. Burbank, *supra* note 24, at 205–06; Burbank, *supra* note 52, at 395–403.

305. *Schlosser Report*, *supra* note 189, para. 78; SCHACK, *supra* note 166, at 220, no. 495.

Regulation are thought to typify the considerations relevant in a *forum non conveniens* analysis.<sup>306</sup> This is true also for the multilateral considerations that due process cannot encompass adequately, but that European law fulfills with other means.<sup>307</sup> In other words, Europeans do not think that a system of horizontally-based jurisdiction needs to be supplemented by a horizontal institution like *forum non conveniens* to provide a missing element.

The reciprocal is true for *lis alibi pendens*. Americans do not think that vertical notions of jurisdiction imply the supremacy (or exclusivity) of one proceeding over others that may be brought. Regarding the treatment of parallel proceedings between U.S. law and European law, two differences are notable. First, European law tries to avoid parallel proceedings from the beginning through rules on *lis alibi pendens*. If another court is already seized with an affair, the second court seized must decline jurisdiction.<sup>308</sup> European law allows courts to decline jurisdiction by discretion in favor of proceedings before another court only for related actions.<sup>309</sup> U.S. law, by contrast, has a similarly strict rule only for the recognition stage: the first decision rendered becomes binding on other courts.<sup>310</sup> So European law focuses entirely on a priority of the court first seized,<sup>311</sup> while U.S. law focuses largely on the priority of the judgment rendered. Second, to the extent that U.S. law addresses parallel proceedings earlier, it gives the judge three options: stop her own proceedings in favor of the other court (*forum non conveniens*), try to stop the proceedings in the other court in favor of her own proceedings (anti-suit injunctions), or do nothing, but there are no mandatory rules. Europe, by contrast, opposes anti-suit injunctions entirely.<sup>312</sup>

It should be obvious how the first of these two differences links with the paradigmatic difference. Because European rules on jurisdiction are understood to be international and multilateral, one court's decision about its jurisdiction necessarily includes a decision about the potential jurisdiction of other courts. It follows that the first court's decision that it has jurisdiction can be given effect against all other courts, since other courts could not validly invoke any multilateral factors that are not already inherent in the provisions applied by the original court. It is a misunderstanding, therefore, to complain that in dealing with parallel

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306. KROPHOLLER, *supra* note 204, at 595–96; SCHACK, *supra* note 166, at 223, no. 502.

307. For a detailed comparison, see NUYTS, *supra* note 47, at 368–456 (2003).

308. Brussels I, *supra* note 18, art. 27. See Peter E. Herzog, *Brussels and Lugano, Should You Race to the Courthouse or Race for a Judgment?*, 43 AM. J. COMP. L. 379 (1995).

309. Brussels I, *supra* note 18, art. 28.

310. Herzog, *supra* note 308.

311. KROPHOLLER, *supra* note 190, art. 27, no. 1.

312. Case C-159/02, *Turner v. Grovit*, 2004 E.C.R. I-3565; for criticism, see Hartley, *supra* note 23, at 821–23; Fentiman, *supra* note 25, at 83, 111–26.

proceedings “the [Brussels] Convention system makes no attempt to decide which of the two courts is more appropriate.”<sup>313</sup> Rather, all rules of the Brussels Regulation carry the presumption that they assign jurisdiction to courts that are *a priori* equally appropriate,<sup>314</sup> so no further *forum non conveniens* test is necessary. In this sense, *lis alibi pendens* is the formal resolution of a conflict between different courts all deemed similarly appropriate vis-à-vis each other. For U.S. law, on the other hand, it makes sense to deal with parallel proceedings only at the recognition stage, because until then each court assumes (or denies) its jurisdiction regardless of others on a unilateral basis, and thus in relative obliviousness to the situation of other states’ or countries’ courts.

The paradigmatic difference also does much to explain the differing views on antisuit injunctions. Proponents make two arguments to defend such injunctions in the context of the Brussels Regulation. First, such injunctions are not directed against the other court but against the party; as a consequence, the injunctions do not interfere with another court’s autonomy.<sup>315</sup> Second, antisuit injunctions actually promote the ideals of the Brussels Regulation, because they help divest foreign courts from exercising jurisdiction that they do not rightfully have.<sup>316</sup>

These arguments are telling because they make sense only in the American, not in the European paradigm. The first argument—that injunctions are directed against the parties rather than foreign courts—presumes an understanding of jurisdiction in which the relevant relationship is the vertical one between the court and the parties, not the horizontal relationship to other courts. At the same time, the argument fits a domestic paradigm. Antisuit injunctions help a court maintain litigation within its domestic realm over the obstruction of a party. Whether this obstruction takes place through “domestic” contempt of court or by bringing suit in a foreign court matters little; in both cases the vertical relation between the court and the defendant is all that counts, and measures of the court are directed only against the party before it. As strong as these arguments are in the U.S. paradigm, they are weak within the European paradigm. In a vertical and international paradigm, injunctions undeniably interfere with other courts’ autonomy.<sup>317</sup>

The second argument—that injunctions actually support the Brussels regime—makes sense in a unilateral system in which each court interprets

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313. Hartley, *supra* note 23, at 816.

314. *Supra* text before note 210.

315. Turner v. Grovit, [2000] 1 Q.B. 345, 364 (C.A. 1999).

316. See Hartley, *supra* note 23.

317. Some common law lawyers concede this; see, e.g., Fentiman, *supra* note 25, at 124; see also the debate in *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 927 (D.C. Cir. 1984).

jurisdictional rules in isolation from others, and in which multilateral considerations must be contributed through other means. In the multilateral European paradigm, this argument must fail. If each court, in deciding whether it has jurisdiction, must make its decision multilaterally, then it must also consider all the vertical arguments in view of the claims of other courts to jurisdiction, and no court should restrain another court from making this decision autonomously. The question both courts face is the same and neither of them is hierarchically superior to the other.<sup>318</sup>

### E. *The Style of the Hague Negotiations*

Finally, we return to the Hague negotiations. Different paradigmatic positions help explain some under-appreciated features of the negotiation process. First, they help expose a startling difference in perception of what the negotiations were about.<sup>319</sup> For the U.S. side, the negotiations represented a matter of bargaining over power positions, while Europeans considered the negotiation as a common attempt to find the best rules for a quasi-codification. In the United States, various academic articles described the negotiations as a matter of trade or bargain.<sup>320</sup> Of course, Europeans also acted strategically, maintaining both the applicability of exorbitant bases of jurisdiction against third states<sup>321</sup> and the reciprocity requirement for recognizing foreign judgments<sup>322</sup> in order to improve their bargaining position vis-à-vis the United States.<sup>323</sup> Such

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318. Of course, whether such considerations occur in fact, and whether all courts in the European Union are equally well-equipped, is a different matter. For debate, see Felix Blobel & Patrick Späth, *The Tale of Multilateral Trust and the European Law of Civil Procedure*, 30 EUR. L. REV. 528 (2005).

319. This is a simplified account that cannot grasp the subtleties of the negotiations.

320. Ronald A. Brand, *Recognition of Foreign Judgments as a Trade Law Issue: The Economics of Private International Law*, in ECONOMIC ISSUES IN INTERNATIONAL LAW: COMPARATIVE AND EMPIRICAL PERSPECTIVES 592, 592–93 (Bhandari & Sykes eds., 1998); Russell J. Weintraub, *How Substantial is Our Need for a Judgments-Recognition Convention and What Should We Bargain Away to Get It?*, 24 BROOK. J. INT'L L. 167 (1998). But see the criticism of such an approach by Andreas Lowenfeld, *supra* note 17, at 302.

321. *Supra* text accompanying note 200.

322. SCHACK, *supra* note 166, at 377. For the impact of the German requirement on U.S. judgments, see Wolfgang Wurmnest, *Recognition and Enforcement of U.S. Money Judgments in Germany*, 23 BERKELEY J. INT'L L. 175, 186–88 (2005); see also CHRISTOPH SCHÄRTL, DAS SPIEGELBILDPRINZIP IM RECHTSVERKEHR MIT AUSLÄNDISCHEN STAATENVERBINDUNGEN UNTER BESONDERER BERÜCKSICHTIGUNG DES DEUTSCH-AMERIKANISCHEN RECHTSVERKEHRS 264–71 (2005).

323. The latter may have backfired. The ALI proposes the reintroduction of a reciprocity requirement into U.S. law. See ALI JUDGMENTS STATUTE, *supra* note 159, § 7, at 94, 97; Linda J. Silberman & Andreas F. Lowenfeld, *The Hague Judgments Convention—And Perhaps Beyond*, in LAW AND JUSTICE IN A MULTISTATE WORLD, *supra* note 46, at 121, 134–35. The result is a prisoners' dilemma in which, absent a treaty, no side will take the first step towards cooperation, unless it is willing to use the "tit for tat" strategy; for such a proposal, see Tho-

strategies notwithstanding, the ideal end result for Europeans closer resembled a codification of best jurisdictional practices than a treaty. This preference for codification may explain the remarkable lack of interest among European academics and practitioners in the negotiations, compared to the intense reactions within the United States. Certainly, the fact that a codification of best practices of jurisdiction already existed, namely in form of the Brussels Convention,<sup>324</sup> made the Hague negotiations look like a relatively technical matter. It also explains why Europeans hoped for a broad convention covering many areas of the law. In their view, a convention that unified only restricted areas was not worth the candle.<sup>325</sup> Americans, on the other hand, were happy to agree on some matters they thought were favorable to them and leave other areas to the unregulated status quo. A codification requires wide-reaching unification of law; a treaty does not.

It is not enough to point to the general preference of civil law countries for codification as the sole explanation for the difference in negotiation styles,<sup>326</sup> because this preference for codification must be explained within the realm of jurisdiction. The difference in attitude is better explained with reference to the two paradigms. One obvious explanation lies in the political character of American jurisdictional thinking, which lends itself more to the process of give-and-take bargaining than the apolitical European understanding of jurisdiction. Another explanation may be counterintuitive at first, but ultimately more important: a unilateral paradigm of jurisdiction is more appropriate for international unification through negotiations and bargaining.<sup>327</sup> If a country first determines its own scope of jurisdiction without regard to the interests of other countries, it is easier to define a bargaining position for negotiations with a view to a rational bargain leading to a mutually optimal result.<sup>328</sup> By contrast, the multilateral paradigm Europeans endorse does not lend itself so easily to international bargaining. Because

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mas Pfeiffer, *Kooperative Reziprozität— § 328 I Nr. 5 ZPO neu besichtigt*, 55 RABELSZ 734, 742–43 (1991).

324. *Supra* note 18.

325. Schack, *supra* note 34, at 316.

326. Hartley, *supra* note 23, at 813–14. This difference between civil law and common law has always been exaggerated. *See, e.g.*, Hein Kötz, *Taking Civil Codes Less Seriously*, 50 MOD. L. REV. 1 (1987); *see also* Gunther A. Weiss, *The Enchantment of Codification in the Common Law World*, 25 YALE J. INT'L L. 435 (2000). For the question to what extent Brussels I is influenced by civil law, see the references *supra* notes 185–186.

327. *See* Ralf Michaels, *Three Paradigms of Legal Unification: National, International, Transnational*, 96 ASIL PROCEEDINGS 333, 334–35 (2002).

328. *Cf.* Brand, *supra* note 320 (discussing the negotiations as a bargaining process); for prescriptive jurisdiction, *see also* Joel P. Trachtman, *Economic Analysis of Prescriptive Jurisdiction*, 42 VA. J. INT'L L. 1 (2001); Andrew T. Guzman, *Choice of Law: New Foundations*, 90 GEO. L.J. 883 (2002).

Europeans have already adopted potentially universal rules, their interest is more in transposing these rules to the global level, as they did by using the Brussels Regulation as a model for the Hague. Only the convention-as-bargain model fits well into the political and unilateral paradigm of jurisdiction in the United States, while the convention-as-codification model goes better with the European apolitical, multilateral paradigm.

The paradigmatic difference provides a good explanation for another issue. Europeans preferred to unify both the law of recognition and enforcement and the law of jurisdiction in a “double convention,” in which every imaginable basis of jurisdiction would be either required or prohibited for purposes of jurisdiction and enforcement. By contrast, Americans supported a “mixed convention,” which would have included agreement on both required and forbidden grounds of jurisdiction, but would have retained a third gray zone of bases that are neither required nor prohibited, but merely permitted.<sup>329</sup> Clearly, such a model works well in the framework of a bargain—bases on which agreement cannot be reached are left in the gray zone, which represents the state of nature.<sup>330</sup> The mixed convention is much more anathema to the framework of codification, for which a residual area of state of nature is much more alien. This is certainly one important reason why Europeans rejected the model until quite recently:<sup>331</sup> there was the fear that the gray zone could become too large.<sup>332</sup> Thus, while it is probably correct to point out that the Hague process would have been more promising if the negotiating partners had focused on a mixed convention from the beginning,<sup>333</sup> adoption of a mixed convention model would not have been a neutral step either. It would have been an accommodation of the U.S. versus the European paradigm of jurisdiction.

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329. For explanations of the mixed convention, see von Mehren, *Recognition and Enforcement of Foreign Judgments*, *supra* note 34, at 282–87 (1994); Arthur T. von Mehren, *The Case for a Convention-mixte Approach to Jurisdiction to Adjudicate and Recognition and Enforcement on Foreign Judgments*, 61 *RABELSZ* 86 (1997). The meaning of a mixed convention has always been ambiguous; see Michaels, *supra* note 142 Part II.4.

330. Michaels, *supra* note 142, Part IV.1.

331. Schack, *supra* note 34, at 316, 326–27, 331; Haimo Schack, *Entscheidungszuständigkeiten in einem weltweiten Gerichtsstands- und Vollstreckungsübereinkommen*, 8 *ZEUP* 931, 931–32 (1998); Olivier Tell, *Tentative Draft on the Jurisdiction and the Enforcement of Foreign Judgments: Can a Mixed Convention Work?*, in *A GLOBAL LAW OF JURISDICTION AND JUDGMENTS*, *supra* note 36, at 37.

332. Schack, *supra* note 34; Borràs, *supra* note 10, at 51.

333. von Mehren, *supra* note 36, at 198–200 (2001); Brand, *supra* note 45, at 5–9; von Mehren & Michaels, *supra* note 201; see also McClean, *supra* note 35, at 263.



## V. CONCLUSIONS

Both Americans and Europeans discussing jurisdictional issues sometimes claim universal applicability for their theories.<sup>334</sup> This Article has shown the limits to such claims. Jurisdictional regimes in the United States and Europe are functionally equivalent insofar as they must deal with similar problems, namely the horizontal allocation of jurisdiction between states and the vertical protection of parties against courts. Yet differences exist not only between the rules, institutions, and theories, but also between the paradigms within which each side creates and justifies these rules, institutions, and theories.

This argument provides responses to the convergence thesis laid out in the introduction. All three variants of the convergence thesis are too narrowly focused on individual problems and institutions. Paradigms, by emphasizing how all such institutions interact with whole legal systems, can explain why convergence does not occur. This is true for all three variants of the thesis. Even under economic pressure of globalization, path dependency provides an answer to why different legal systems achieve different institutional solutions that are efficient in their respective legal systems. Functional equivalence can explain not only how different legal systems largely reach the same results by different (equivalent) means, but also why, since legal systems differ in the means they use to fulfill similar functions, functional equivalence enables difference rather than similarity.<sup>335</sup> Paradigms can show how legal solutions are embedded, if not in amorphous and general national cultures, at least in general national argumentative patterns that lead to different responses to similar problems.

At the same time, the paradigmatic difference suggests the risks involved in criticizing solutions from another legal system. Since the critic argues from a paradigm different from the rules she criticizes, she may risk holding an inappropriate standard to that law.

So, what is to be done? One might be tempted to try and create a neutral paradigm transcending the differences by combining the two existing paradigms. A neutral paradigm would be one that gives equal weight to the vertical relation between the court and the parties and the

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334. von Mehren, *supra* note 100, at 281 (“the theoretical analysis proposed is intended to have general application and to illuminate any contemporary legal order’s efforts to address the problem of adjudicatory jurisdiction in principled terms”); SCHRÖDER, *supra* note 166, at 109 (“The idea of the jurisdiction-focused procedural interests is legitimate under every legal order. One may even tend towards the view that the jurisdictional interests reflect, secularize (if the notion is allowed) certain logical structures of procedure.”) (Ralf Michaels trans.). *But cf.* PFEIFFER, *supra* note 110, at 19–20 (explicitly limiting his findings to German law).

335. Michaels, *supra* note 3, at 371–72.

horizontal relation between the courts of different states. Such an idea faces serious problems. First, each paradigm already contains a combination of both horizontal and vertical considerations. The U.S. paradigm is vertical, but it accounts for horizontal considerations partly through subsumption, partly through externalization. The European paradigm is horizontal, but it likewise accounts for vertical considerations through subsumption and externalization. That each paradigm accounts for both kinds of considerations provides an explanation for why each of them is relatively stable. Second, because horizontal and vertical relations are incommensurable, it is hard to imagine a paradigm that gives equal weight to both without determining what equal weight would actually mean. Quite possibly, subsumption and externalization of one of the two considerations is a more successful way of achieving such commensurability.

If anything, the relative stability of each paradigm provides a strong caveat against any hope for easy unification. Comparative lawyers often claim that unification of laws is made easier by the insight that different legal systems fulfill the same functions through different means—the idea of functional equivalence.<sup>336</sup> Such a hope undoubtedly lay at the base of the Hague negotiations. The failure of these negotiations yields evidence for the opposite claim: functional equivalence provides strong arguments against unification.<sup>337</sup> Functional equivalence thus serves, ironically, to explain the failure of the Hague negotiations. Precisely because different legal orders can fulfill the same functions by different means, they are not forced to surrender their own means for others if those other means are not superior but “equivalent.”<sup>338</sup> To adopt the functionally equivalent institution of another law does not yield great benefits—because that institution will only fulfill the same functions—while creating great costs.<sup>339</sup> And since legal orders function as whole entities, unification of individual elements has likely ramifications in other parts of the legal system.<sup>340</sup> The recent unhappiness in the United Kingdom<sup>341</sup> over the degree to which the Brussels Regulation interferes with areas thought to be separate from jurisdiction—*forum non conveniens* and antisuit injunctions—is both proof of this thesis and a warning for unification proposals.

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336. *Supra* note 3.

337. Michaels, *supra* note 3, at 376–78.

338. *Id.* at 374.

339. *Id.*

340. See Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 MOD. L. REV. 11, 12 (1998).

341. See Hartley, *supra* note 23.

If this is so, then unification of jurisdictional law may be possible neither within one paradigm nor through a combination of both paradigms, but only through a common paradigm shift. It is unlikely that either Europeans or Americans will adopt the other side's paradigm. More likely is the realization that both paradigms are inadequate. The Hague negotiations failed not only because of differences between the negotiating parties, but also because new issues arose that posed seemingly insurmountable challenges to all participants: the Internet, intellectual property, and human rights litigation. Both Americans and Europeans struggle with the difficulties of territorializing the Internet, the global proliferation of IP-protected goods, the urgent desire to render justice to victims of human rights violations, and the existence of global cartels. Neither the American nor the European approach seems able to cope properly with the challenges these issues pose, and both fail for similar reasons.

If U.S. and European approaches to jurisdiction are equally unable to resolve certain issues, this suggests the problem is not so much a paradigmatic difference between the two, but rather a common inadequacy. Both the domestic and the international paradigms rely on the traditional image of sovereignty in what is often referred to as the Westphalian model. Sovereignty in this sense has two aspects. One of them, the exclusive power of a state to regulate events within its territory, corresponds well with the domestic paradigm of jurisdiction. The other aspect, the mutual recognition between sovereign states, corresponds with the international paradigm of jurisdiction. If this traditional image of sovereignty is inadequate under conditions of globalization, as is frequently claimed, then both paradigms are similarly inadequate as well, and both sides must come together to create a new, third paradigm of jurisdiction. But this remains a topic for another study.